

IN THE CIRCUIT COURT OF THE STATE OF OREGON  
FOR THE COUNTY OF MULTNOMAH

THE ESTATE OF MICHELLE )  
SCHWARZ, deceased, by and )  
through her Personal )  
Representative, RICHARD )  
SCHWARZ, ) Vol. 34-B  
 )  
Plaintiff, ) Circuit Court  
 ) Case No. 0002-01376  
vs. )  
 )  
PHILIP MORRIS INCORPORATED, )  
a foreign corporation, and )  
ROTHS I.G.A. FOODLINER, )  
INCORPORATED, an Oregon )  
corporation, )  
 )  
Defendants. )

TRANSCRIPT OF PROCEEDINGS

BE IT REMEMBERED, That the  
above-entitle matter came on regularly for Jury  
Trial and was heard before the Honorable Roosevelt  
Robinson, Judge of the Circuit Court of the County  
of Multnomah, State of Oregon, commencing at 11:15  
a.m., Wednesday, February 27, 2002.

\* \* \*

Jennifer L. Wiles, CSR, RPR.  
710 Multnomah County Courthouse  
1021 SW Fourth Avenue  
Portland, Oregon 97204

## 1 APPEARANCES:

2 Mr. D. Lawrence Wobbrock, Attorney at Law,  
3 Mr. Charles S. Tauman, Attorney at Law,  
4 Mr. Richard A. Lane, Attorney at Law,  
5 Appearing on behalf of the Plaintiff;

6 Mr. James L. Dumas, Attorney at Law,  
7 Mr. John W. Phillips, Attorney at Law,  
8 Appearing on behalf of Defendant  
9 Philip Morris, Incorporated and Defendant  
10 Roths I.G.A. Foodliner, Incorporated;

11 \* \* \*  
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WITNESS INDEX

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11 FOR THE PLAINTIFF: Direct Cross ReD ReX

12 Robert W. Johnson

By Mr. Dumas

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By Mr. Tauman

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(February 27, 2002)

\* \* \*

A.M. PROCEEDINGS

\* \* \*

(Whereupon, the preceding proceedings were reported by Katie Bradford. This transcript, Vol. 34-B, was reported by Jennifer Wiles, as follows:)

\* \* \*

THE CLERK: Please remain seated. Court is in session.

THE COURT: Yes. Remain as you are.

And, if there are no legal matters for the Court, we'll ask the witness to resume the witness stand, and we will bring the jury back.

Let us proceed, please.

All right. Let us proceed again.

Can I see a couple counsel up at the bench, please?

(Off-the-record sidebar.)

THE COURT: Thank you.

Counsel for the plaintiff, You may proceed.

MR. TAUMAN: We have no further questions. At this time Mr. Dumas may --

1 THE COURT: Well, in that case, counsel  
2 for the defense, you may start your  
3 cross-examination.

4 MR. DUMAS: Thank you, Your Honor.

5  
6 CROSS-EXAMINATION

7  
8 BY MR. DUMAS:

9 Q Good morning, Mr. Johnson.

10 A Good morning.

11 Q My name is James Dumas. I represent  
12 Philip Morris in this case. You and I have not had  
13 an opportunity to talk before?

14 A That's correct.

15 Q About your opinions here today?

16 A That's correct.

17 Q First, Mr. Johnson, let me preface my  
18 questions by saying that I don't think there's any  
19 disagreement in this courtroom that Philip Morris,  
20 Incorporated is a profitable company. Do you agree  
21 with that?

22 A Yes.

23 Q All right. Probably worth billions of  
24 dollars; right?

25 A Yes.

1 Q All right. But Philip Morris,  
2 Incorporated is not the parent company, is it?

3 A It is not.

4 Q Okay. It's a lot smaller than the parent  
5 company, isn't it?

6 A It's about one-third.

7 Q Okay.

8 A A little less than one-third.

9 Q All right. And Philip Morris companies,  
10 the parent company, owns other companies, correct,  
11 of which Philip Morris, Incorporated, the defendant  
12 in this case, is one?

13 A Correct.

14 Q Now, with regard to the first or one of  
15 the numbers that you talked to us about, the market  
16 capitalization, that is the value of all of the  
17 outstanding shares of a corporation; correct?

18 A Share price times number of shares.

19 Q Share price.

20 A Out standing.

21 Q Share price times the number of shares;  
22 correct?

23 A Correct.

24 Q And the figure that you give us for market  
25 capitalization in this case is not the market

1 capitalization number for Philip Morris,  
2 Incorporated, the defendant in this case, because  
3 Philip Morris, Incorporated does not issue shares;  
4 correct?

5 A Correct.

6 Q All right. So, the market capitalization  
7 of some 100-plus billion dollars is of the parent  
8 company, not Philip Morris, Incorporated, the  
9 defendant in this case; correct?

10 A It is not exclusively Philip Morris,  
11 Incorporated, the defendant. It would be included  
12 in that whole.

13 Q It's part of the pie?

14 A Correct.

15 Q To use your analogy; right? Okay.

16 And the market capitalization of  
17 Philip Morris companies, like any corporation that  
18 is publicly traded, that's not money in the pocket  
19 or in the bank account of the corporation, is it?

20 A That's correct.

21 Q All right. That is simply the value of  
22 all of the outstanding shares, the share price times  
23 the number of shares, out there in the world, held  
24 by all sort of folks and companies and whatever;  
25 correct?



1 A I'm not sure about the whatever, but it  
2 is, yes, share price, times number of shares.

3 Q Just so there's no confusion, the market  
4 capitalization number is not money in the bank  
5 account of Philip Morris companies, is it?

6 A No.

7 Q All right.

8 And, as we all know, share value, the  
9 price of a share of stock, goes up and down, doesn't  
10 it?

11 A Sure does.

12 Q All right. And whether you are talking  
13 Willamette Industries, whether you are talking  
14 Weyerhaeuser, whether you are talking Philip Morris  
15 companies, whether you are talking about Enron,  
16 market capitalization does not necessarily equal the  
17 amount of assets that company holds, does it?

18 A Market capitalization is not a measure of  
19 assets.

20 Q Correct. That's my point, Doctor.

21 And because a company has a very  
22 large market capitalization does not necessarily  
23 mean that it has a whole lot of assets; correct?

24 A When you say a whole lot of assets, I'm  
25 trying to think back over the years as to where we

1 have companies with over \$100 billion in market cap  
2 that don't have a whole lot of assets.

3 Q And I'm not suggesting that Philip Morris  
4 doesn't have a whole lot of assets, Mr. Johnson.

5 A Okay.

6 Q I'm simply making the point that you can't  
7 necessarily equate the two. And I'll give you a  
8 hypothetical or an example.

9 Six months ago Enron had a huge  
10 market capitalization, didn't it?

11 A It sure did.

12 Q One of the biggest corporations in the  
13 world; right?

14 A Very large.

15 Q Okay. And today that market  
16 capitalization is in the toilet?

17 A Right.

18 Q And all of a sudden Enron, the company  
19 that company people thought had tons of assets,  
20 doesn't have so many assets, do they?

21 A They are still trying to determine how  
22 many assets they still have.

23 Q Fair enough.

24 A That's part of the problem. And who left  
25 with them.

1 Q Now, you talked about the value -- let me  
2 back up.

3 Market capitalization is really a  
4 value, if you will, placed on the shares  
5 outstanding, the value placed really on those shares  
6 by the marketplace, right?

7 A Correct.

8 Q Okay. So, if you have got Philip Morris  
9 companies that we heard so much about, that piece of  
10 pie that you talked about, when we talk about market  
11 capitalization, that's really the value, based on  
12 shares, that the marketplace has placed on all of  
13 the different subsidiaries and entities combined of  
14 Philip Morris; correct?

15 A That's correct.

16 Q And sometimes, Doctor, Mr. Johnson,  
17 sometimes the market capitalization, the value that  
18 the marketplace places in a corporation is in fact  
19 influenced by the fact that the marketplace respects  
20 and values the fact that the parent company has  
21 diversification, has different companies in  
22 different areas doing different things; right?

23 A The market can, if it chooses to value  
24 them, give it a plus or chooses, if it thinks it's  
25 diversification, quote, unquote, being in different

1 industries, doesn't make a lot of sense, it can give  
2 it a minus.

3        Q      But some parents companies and many parent  
4 companies, diversification is value as a premium,  
5 because it insulates or protects the company from  
6 year to year variability; correct?

7        A      It depends on how you assess the  
8 diversification. If the diversification has a  
9 positive impact on all of the overall performance of  
10 the company, then, yes. But if you diversify it  
11 into losing industries, you have got different  
12 areas, but they are all going south on you, no, the  
13 market with will not give you a premium for that.

14        Q      Depends on the company and what their  
15 holdings are; right?

16        A      Sure.

17        Q      Of course. That's all the point I'm  
18 trying to make.

19                      And when revenues in one subsidiary  
20 go up, for whatever reason, maybe revenues in  
21 another subsidiary go down for whatever reason;  
22 right?

23        A      Does that happen from time to time?

24        Q      Yes, sir.

25        A      Of course.

1 Q So, in terms of valuing the entity,  
2 sometimes the whole can be worth more than the  
3 individual sums of the components; right?

4 A Under certain circumstances, sure.

5 Q Now, as you talked about earlier, market  
6 capitalization is variable and it changes from day  
7 to day; right?

8 A Sure.

9 Q Okay. And the actual owners of that  
10 stock, like the owners, for example, of Philip  
11 Morris companies, are all sorts of different,  
12 different entities, different retirement funds,  
13 pension plans, individuals, companies, all sorts of  
14 folks own shares issued by Philip Morris companies;  
15 right?

16 A Sure do.

17 Q Mr. Johnson, isn't it true that you are  
18 not aware of any recognized methodology in the  
19 peer-reviewed economic literature that supports a  
20 means, an analysis of establishing the value of a  
21 subsidiary based on its percentage of market  
22 capitalization of the parent company?

23 A I am not aware of any specific methodology  
24 that says this is the ultimate way of saying this is  
25 the total value of an entity by looking at its

1      subsidiary on that part.

2                    I did learn in school, back in the  
3      undergraduate level, that this is one way of trying  
4      to make an assessment when you don't have a direct  
5      hard number, when you are trying to get a framework  
6      valuation.

7                    I'm sort of setting a left-field  
8      right-field foul line on that basis.

9                    But as it was taught to me, this is  
10     one way of looking and trying to get an estimate of  
11     value. It is not the ultimate. It is not the best.  
12     The best is just to have the numbers. But when you  
13     are trying to make assessments, this is how you can  
14     sort of try to attempt to frame the numbers.

15            Q      So, your market capitalization method is  
16     not the best way, is it?

17            A      Oh, it's not. No, it's not the best way.  
18     The best way is to just find out what the numbers  
19     are.

20            Q      Now, I want to talk to you a little bit  
21     about revenue and income. Okay?

22                    First, revenues. Revenues, the  
23     numbers that you showed the jury for annual revenues  
24     of Philip Morris, Incorporated, the defendant in  
25     this case, that's the money that the corporation

1 takes in for total value of the goods and services  
2 it sells; right?

3 A Correct.

4 Q It's kind of like someone's gross salary,  
5 before taxes, before expenses, before costs of being  
6 an employee; right?

7 A Don't forget fringe benefits.

8 Q Okay. Fair enough. It is kind of the  
9 same thing, isn't it?

10 A You want to make the whole compensation.

11 Q Okay. But operating income, like you  
12 talked about, is not net profit, is it?

13 A No, it's not.

14 Q All right. So, the \$5.3 billion dollars  
15 that Philip Morris, Incorporated listed in its  
16 filings with the SCC or its parent company did, as  
17 its operating income for the year 2000.

18 A Two years ago.

19 Q Two years ago, fine. That's not the net  
20 profit of Philip Morris, Incorporated, is it?

21 A No.

22 Q All right. That's not what Philip Morris  
23 got to keep in its bank account, did it?

24 A No.

25 Q No. And that number has to be reduced by

1    the rate of taxes, which the annual report  
2    indicates, does it not, Mr. Johnson, at 39 percent,  
3    for federal and state taxes?

4            A    Well, you know, when you say the federal  
5    and state taxes, that's for all. I didn't see  
6    anything that broke it up for tobacco versus all of  
7    the others.

8            I don't know what other accounting  
9    transactions that may have shifted, whether or not  
10   tobacco in terms of what it was able to do from an  
11   accounting standpoint to lower its tax rate on that  
12   part. I don't know what that number would be.

13           I do know that if you look at the  
14   operating profit of tobacco and compare it to the  
15   total net income, the difference between operating,  
16   for the whole, it's about a 50-percent reduction, if  
17   you assumed everything was proportional, but we  
18   don't know because inside a corporation such as this  
19   the corporate powers that be, the parent company,  
20   decide which subsidiary may absorb more share of  
21   expenses than another subsidiary.

22           Q    I appreciate --

23           A    So, that's what makes it difficult since  
24   Philip Morris has chosen not specifically to break  
25   that out.



1 Q And so you have not examined the financial  
2 statements or the balance statements of Philip  
3 Morris, Incorporated; correct?  
4 A No.  
5 Q Okay.  
6 A No, no, counsel. I have examined the  
7 financial statements of Philip Morris, Incorporated  
8 as provided by the SCC.  
9 Q All right. All right.  
10 A I did not see where they broke out the net  
11 income. That was a decision they made.  
12 Q I understand that. But what those filings  
13 do reveal, do they not, Mr. Johnson, was that Philip  
14 Morris companies reported an effective tax rate on  
15 its earnings of 39 percent; correct?  
16 A You mean for the whole company?  
17 Q Yes.  
18 A Everybody?  
19 Q Yes.  
20 A National, international, all of the other  
21 parts?  
22 Q Yes, sir.  
23 A That sounds about right.  
24 Q And then, in addition to paying taxes, as  
25 you talked about, operating income is really known

1 as an acronym for it. What is it? EBIT, earnings  
2 before interest and taxes; right?

3 A Well, EBIT, EBIT, AT. There's a number --

4 Q Sure.

5 A -- for it.

6 Actually, the operating income that I  
7 have been looking at is basically before interest,  
8 taxes depreciation, good will.

9 Q Okay. So, we talked about taxes. What  
10 about interest, Doctor?

11 A Yes. That's before that.

12 Q Now, what does that mean? Why don't you  
13 tell the jury, tell us what that means?

14 A Interest is what you pay on your mortgage,  
15 on your credit cards.

16 Q So, when a corporation borrows money, it  
17 has a debt load, and it has to pay the interest back  
18 to whoever it borrowed the money from?

19 A That's right.

20 Q And that \$5 billion-dollar number you  
21 talked to did not take into account Philip Morris,  
22 Incorporated interest payments?

23 A No. They didn't tell us what their  
24 interest payments were.

25 Q Fair enough. Now, I want to direct your

1 attention to I think it was your third method of  
2 offering an opinion regarding financial condition,  
3 which is the willing-buyer willing-seller method.  
4 Okay?

5 A Sure.

6 Q Great.

7 What a willing buyer is willing to  
8 pay for something depends upon, in part, his or her  
9 motivation; correct?

10 A Of course.

11 Q Okay. Do you know why Philip Morris chose  
12 to purchase the three brands we talked about in  
13 1998?

14 A I assume that it was specifically because  
15 they thought it would be a benefit to the company.

16 Q You do not know precisely why Philip  
17 Morris made that decision, do you?

18 A Other than that they thought it would be a  
19 positive impact on the company, no. I wasn't at the  
20 managers' meeting, as to someone may have liked Lark  
21 maybe more than L & M. I don't know.

22 Q And sometimes the corporation or an  
23 individual makes a decision, they want something bad  
24 enough, they are willing to pay a premium for it;  
25 right? They are willing to pay over market value;

1      correct?

2            A      Well, you said, they want something bad  
3      enough, pay over market value on that part, whatever  
4      they pay is market value. When you buy a house,  
5      what you pay, you set the market value. That may be  
6      more than the owner originally had, and that may be  
7      more than your neighbor across the street paid for  
8      their house, but you reset the market value.

9            Q      You may also pay more for that house than  
10     you can resell it for next week; right?

11          A      Well, that's outside of your control.  
12     That's why you do property due diligence because you  
13     hope to buy up, not down.

14          Q      Now, do you know where Estacada is?

15          A      Excuse me, sir?

16          Q      Do you know where Estacada is?

17          A      Estacada?

18          Q      Yes, sir.

19          A      No, sir.

20          Q      Okay. I want you to assume that a fellow  
21     has a house in Estacada with a nice view of Mt.  
22     Hood.

23          A      Fine.

24          Q      Okay. I want you to also assume that  
25     somebody else buys an adjacent lot to that and

1    builds a big-old huge child's play structure and  
2    ruins the guy's view of Mt. Hood.    Okay?

3            A      Okay.

4            Q      All right.    I want you to further assume  
5    that this guy who has this lot and has this view of  
6    Mt. Hood decides that he really wants that view back  
7    and he's willing to go down to his neighbor and  
8    offer two, three, four times, whatever it might that  
9    take, the value of that lot so he can tear down that  
10   play structure so he can have his perfect view of  
11   Mt. Hood.    All right?

12          A      All right.

13          Q      That a simple example, isn't it, of how  
14    sometimes some buyers are willing to pay more than  
15    the traditional value of an item to get what they  
16    want; right?

17          A      Sure.

18          Q      All right.

19                    Is it fair to say, Doctor, that you  
20    cannot identify any specific peer-reviewed economic  
21    literature that supports your methodology that asset  
22    acquisition is an appropriate and an accepted means  
23    by which to value a company?

24          A      Asset acquisition?    Off of the top of my  
25    head, no.    I just remember we went through it.    We

1    had about a week on it back in undergraduate. But  
2    do I remember the actual text that the professor was  
3    utilizing? No, sir.

4            Q    And, in fact, Mr. Johnson, there are  
5    certain recognized ways by which to, that economists  
6    use to evaluate the net worth of the financial  
7    condition of a company, other than asset  
8    acquisition; right?

9            A    Sure. There's a whole bunch of them.

10          Q    What are some of those ways, Mr. Johnson?

11          A    Well, if you have full access to the  
12    books, you can use the net worth. You can use the  
13    comparable market share. You can use cash flow  
14    multiples. You can use, as we said, the issues of  
15    net worth. You can go ahead and use the -- what we  
16    would call equivalent cash flow multipliers on  
17    earnings. You can use market share dominance, as to  
18    see whether or not, because they have a dominant  
19    share, whether they are worth more than the folks  
20    with a smaller share on a proportional basis.

21                    And economic theory basically says  
22    that, if you have a dominant share, your bigger  
23    share is worth more than somebody than with a  
24    smaller share, even on a proportional basis, because  
25    you have common economies of scale, et cetera, et

1    cetera, sure.

2            Q    Doctor, isn't it true that the  
3    overwhelming number of economists and authorities in  
4    the field of economics utilize the discounted cash  
5    flow method as the best way to value the net worth  
6    and value of a company?

7            A    No.

8            Q    You disagree with that?

9            A    No, I don't think that most of them use  
10   the discounted cash flow as the best way to value  
11   the net worth of a company.

12                    They may talk about, if I'm going to  
13   buy something, in other words, if I'm going to buy a  
14   company, is that a way to talk about what my return  
15   on my investment would be, to set maybe a maximum  
16   price that I will. Which is why, when I look at the  
17   \$300 million that Philip Morris spent for Lark, L&M  
18   and Chesterfield, I assume for that amount of money,  
19   they did one hell of a due diligence research  
20   project so that they could determine, if we are  
21   spending \$300 million, we sure as heck intend to get  
22   our money back, folks.

23            Q    That was your assumption, correct,  
24   Mr. Johnson?

25            A    Sure.

1 Q Okay. And you don't know whether, in  
2 fact, Philip Morris may have made the decision to  
3 purchase those three brands for reasons that have  
4 nothing to do with market share, do you?

5 A I never said they had to do with market  
6 share. It had to do with would they get their money  
7 back? Is it a positive investment? Are they going  
8 to get a net positive return on the \$300 million? I  
9 can't believe they would have done that if they  
10 didn't believe it would be to the benefit of the  
11 shareholders.

12 Q And you did not utilize a discounted cash  
13 flow method to attempt to analyze or value the fair  
14 market value of Philip Morris, Incorporated?

15 A No.

16 Q Now, in assessing the -- you mentioned --  
17 strike that.

18 You mentioned one alternative method  
19 in evaluating the financial condition of the company  
20 is to examine its net worth; right?

21 A That would be one.

22 Q And one of the -- well, there are several  
23 criteria that you look to in analyzing net worth,  
24 right, including such things as cash on hand, cash  
25 flow revenue, profitability, net income, and other



1 factors like contingent liabilities?

2 A No. No. No.

3 Q None of those things you look at?

4 A No.

5 Counsel, the definition of net worth,  
6 assets minus liabilities, that's it. Doesn't say  
7 anything about revenues. It doesn't say anything  
8 about income. Net worth, the definition, is take  
9 all of your assets, take the lower cost of the  
10 market, subject your liabilities, that is your net  
11 worth. That's it. That's all that does.

12 Q And it also includes taking a look at  
13 contingent liabilities; right?

14 A I said liabilities.

15 Q All right.

16 A Whatever assets, minus whatever  
17 liabilities you have on the book, that's it.

18 Q All right. And the market price of a  
19 company's stock or the value, the fair market value  
20 a company may have to a willing buyer and a willing  
21 seller, that can be a factor impacted by contingent  
22 liabilities; correct?

23 A Whatever liabilities are, true, valid and  
24 accurate.

25 Q All right. Because the marketplace tries

1 to take into account the liabilities of a company;  
2 right?

3 A You're saying marketplace. Are we going  
4 back to market capitalization? Because that's the  
5 minimum marketplace. I want to make sure which  
6 marketplace we are talking about.

7 Q I was using your fair, your willing-buyer  
8 willing-seller discussion.

9 A If you are doing the willing-buyer  
10 willing-seller, the only example of that is what  
11 Philip Morris decided to pay for the -- excuse me,  
12 for the specific two-tenths of a percent for the  
13 Liggett group brands on that part.

14 If you are talking about, on the  
15 other hand, the, quote/unquote, willing-buyer  
16 willing-seller, from the perspective of the market  
17 capitalization shareholders, that part, then when  
18 you get into issues of contingent liability, those  
19 are already factored into by the stock price because  
20 they were adjusted for whatever they perceive to be  
21 as the prospective future liabilities, contingent,  
22 et cetera.

23 Q Mr. Johnson, isn't it true that a willing  
24 seller, interested in purchasing Philip Morris,  
25 Incorporated, the defendant in this case, would want

1 to know what the liabilities are of Philip Morris,  
2 Incorporated before they bought it?

3 A Sure.

4 Q Right? Okay.

5 And, Mr. Johnson, you have talked  
6 about the annual report.

7 A Yup.

8 Q Okay. And you have reviewed that?

9 A Yes, I have.

10 Q Isn't it true, Mr. Johnson, that in the  
11 annual report for the year 2000, as reported to the  
12 SCC, Philip Morris, Incorporated had outstanding and  
13 listed as contingent liabilities over 1500  
14 individual lawsuits against it, product liability  
15 for tobacco; correct?

16 A Individual, yes.

17 Q Okay. I would like you to assume for  
18 purposes of a hypothetical, Mr. Johnson, that each  
19 and every one of those individuals was requesting  
20 \$300 million dollars, just like what is being  
21 claimed in this case. Would you use your  
22 calculator, Mr. Johnson, and tell us what  
23 \$300 million times 1500 is?

24 A It would be about \$450 billion.

25 Q \$450 billion dollars?

1 A Yup.

2 Q Okay. Isn't it also true, Mr. Johnson,  
3 that the annual report listed that Philip Morris,  
4 Incorporated was a defendant in an additional number  
5 of lawsuits, 36 class-action lawsuits; isn't that  
6 right?

7 A I think you have got it right.

8 Q Okay. I would like you to further assume  
9 for a hypothetical purpose that each one of those  
10 class actions had potential liability of, oh, let's  
11 say, ten times the amount involved in this lawsuit.  
12 Ten times \$300 million would be \$3 billion dollars;  
13 right?

14 A Your math is good.

15 Q Okay. \$3 billion times 36 class actions  
16 is what, Doctor, or Mr. Johnson?

17 A About \$108.

18 Q About \$108 billion, in addition to the  
19 \$450 billion; correct?

20 A Sure.

21 Q Class actions are suits brought on behalf  
22 of dozens or hundreds or thousands or even hundreds  
23 of thousands of individuals; correct?

24 A It's a group.

25 Q Who claim an injury for some reason or

1    another; correct?

2            A      Sure.

3            Q      Now, Mr. Johnson, wouldn't you also agree  
4    that the amount of money a willing seller would be  
5    willing to pay -- excuse me, a willing buyer would  
6    be willing to pay a seller for a company could be  
7    effected or impacted by whether that company's  
8    business, whatever business it's in, whether or not  
9    that biggest is a growing market or a shrinking  
10   market?

11          A      Could be, sure.

12          Q      Okay. So, for instance, if I was a  
13    manufacturer of vinyl records, I might not be able  
14    to sell my record company for as much perhaps as if  
15    I was a manufacturer of CD's, maybe? Most folks  
16    aren't buying vinyl records like they were 20 years  
17    ago.

18          A      You have got two things. You buy a  
19    business based on what you can get out of it. We  
20    talked about that before.

21                    And so if you have a unique vinyl CD  
22    business that makes the disco records, which some  
23    people still listen to, and you have first presses  
24    of Elvis Presley on vinyl, to collectors, you may  
25    have an extremely profitable business in that sense.

1            Q      Sure.

2            A      But it's a combination of unit price times  
3 the number of units. And if the unit price goes up  
4 fast enough, you're going to do pretty well, even if  
5 the unit number is going down.

6            Q      Okay. Makes sense.

7                    But a smart buyer would look at  
8 trends, wouldn't he or she?

9            A      Of course.

10          Q      You bet. And they would go back one year,  
11 three years, five years, ten years, 20 years,  
12 whatever they want to do, and see how the market is  
13 doing for that product?

14          A      Yup.

15          Q      Okay. Mr. Johnson, isn't it true that  
16 cigarette consumption in this country, over the past  
17 40 years, from 1960 to the year 2000, that cigarette  
18 consumption has declined by 45 percent?

19          A      That figure I don't know.

20          Q      I would like you to assume that,  
21 Mr. Johnson.

22          A      Are we talking cigarette consumption? Are  
23 we talking like units?

24          Q      Yes, sir. First, I'm going to give you  
25 two hypotheticals. Okay, Mr. Johnson?

1 A I just want to make sure --

2 Q You bet you.

3 A -- you're talking about units, not number  
4 of cigarettes, shipments, not dollar value, just  
5 units.

6 Q We'll get there.

7 I want you to assume that, from 1960  
8 to the year 2000, the percentage of smokers in the  
9 United States has decreased from 45 percent  
10 approximately to around 22-23 percent. Okay?

11 A Okay.

12 Q I want you to further assume that, from  
13 the year 1975 to 1999, the absolute number of  
14 cigarettes sold in this country has declined by  
15 almost 180 billion cigarettes. Okay?

16 A Do you know what percentage that is?

17 Q I was going to ask you to do that,  
18 Mr. Johnson, because I think it works out to about a  
19 30-percent drop in the number of cigarettes sold in  
20 this country from 1975 to 1999. Is 30 percent about  
21 right?

22 A Hold on, here.

23 Q Sure. I'll give you the exact numbers so  
24 you can check my math. 1977 numbers, I'll ask you  
25 to assume, Doctor, the total number of cigarettes

1      sold, 599 billion.

2            A      A lot of cigarettes.

3            Q      1999, the total number of cigarettes sold,  
4      420 billion.

5            A      Okay.

6            Q      Assuming those facts are true,  
7      Mr. Johnson, that would show almost a 30-percent  
8      drop in the absolute number of cigarettes sold in  
9      this country; correct?

10          A      Yup.

11          Q      Wouldn't you agree with me, Mr. Johnson,  
12      in the last five, ten, 15, 20 years there have been  
13      an increasing number of rules and restrictions  
14      regarding the use of cigarettes in this country?

15          A      Sure.

16          Q      California, particularly, is on the  
17      cutting edge with that, aren't they?

18          A      I'm not sure where we stand relative to  
19      the other areas, but we do have some pretty strong  
20      smoking ordinances.

21          Q      You bet. And are you aware of the new law  
22      in Oregon further restricting where folks can smoke  
23      cigarettes?

24          A      No.

25          Q      Would you agree with me that an industry



1 that is heavily regulated by state and federal  
2 authorities that those industries' future business  
3 can decline in the event our society decides to  
4 impose further restrictions?

5 A Sure. It can.

6 Q Do you know what brand of cigarettes  
7 Michelle Schwarz smoked?

8 A No.

9 Q Do you know anything about Michelle  
10 Schwarz?

11 A No, other than she's passed away now.  
12 It's not my area of expertise.

13 Q I'll ask you to assume, Doctor, that we  
14 have heard evidence in this -- excuse me. I'm  
15 sorry. I'll ask you to assume, Mr. Johnson, that we  
16 have heard evidence in this case that Michelle  
17 Schwarz smoked Merit cigarettes. Okay?

18 A Okay.

19 Q Do you know what percent of the national  
20 market Merit cigarettes comprises?

21 A No.

22 Q Do you know what percent of Philip Morris'  
23 business, its operating income, its operating  
24 revenue, its net profit is based upon the sale of  
25 Merit cigarettes?

1 A No.

2 Q I would ask you to assume, Mr. Johnson,  
3 that Philip Morris' -- that Merit cigarettes  
4 comprises less than 4 percent of Philip Morris'  
5 cigarette sales in this country. Okay?

6 Now, assuming that to be true,  
7 Mr. Johnson, counsel, Mr. Tauman, didn't ask you to  
8 make a calculation based upon Philip Morris'  
9 earnings or profits on Merit cigarettes, did he?

10 A No.

11 Q You have testified before on punitive  
12 damages?

13 A Sure.

14 Q And every time you have testified about  
15 punitive damages it's been for plaintiff's people,  
16 seeking punitive damages; correct?

17 A Correct.

18 Q You are an experienced witness, aren't  
19 you, Mr. Johnson?

20 A Twenty years.

21 Q Okay. How many times do you think you  
22 have testified in depositions or in trials In the  
23 last 20 years? Give me your best estimate, sir.  
24 Come on, you're a numbers guy.

25 A Yeah. Well, you know, sometimes these

1 things keep going. You know, trials get continued.  
2 Best estimate would probably be I have probably done  
3 well over 500 depositions, maybe encloser to a  
4 thousand. And hundreds of trials, you know.

5 Q So, you are pretty comfortable talking to  
6 folks like this jury?

7 A Sure.

8 Q And as I understand your testimony on  
9 direct exam, and I'm almost done here, your  
10 testimony on direct exam, you spend 100 percent of  
11 your time as a consulting economist in the last 20  
12 some years consulting with lawyers in lawsuits;  
13 correct?

14 A Yeah. I like lawyers.

15 Q When were you first retained in this case,  
16 Mr. Johnson? Do you remember, roughly?

17 A I think it was about the Fall. Excuse me.  
18 The end of December; the beginning of January.

19 Q Of this year?

20 A Yeah. In other words, like December 2001,  
21 January 2002.

22 Q Okay. And whom retained you?

23 A Plaintiff's counsel.

24 Q Mr. Tauman did?

25 A Well, it's a combination of Mr. Tauman and

1 Mr. Lane.

2 Q Do you know where they got your name?

3 A I assume they got it --

4 Q I don't want you to assume or guess. I  
5 didn't mean to cut you off, but no one wants you to  
6 guess or speculate about anything. Do you know?

7 A Just by representation.

8 Q Okay. That's a good answer.

9 Have you worked with either of these  
10 lawyers before?

11 A No.

12 Q You have testified before in cases against  
13 tobacco companies and against Philip Morris, haven't  
14 you?

15 A Yes.

16 Q That's a yes?

17 A Oh, yes. That's a yes.

18 Q Okay.

19 Do you give presentations to groups  
20 of plaintiffs lawyers regarding your work as a  
21 consulting forensic economist?

22 A I give presentations to all lawyers. You  
23 know, whether they are handling a plaintiff's case  
24 or a defense case, I don't know. They are in the  
25 audience. And I know some of them I have worked on

1 one case for them for a plaintiff and another case  
2 for a defendant, the same attorney. But do I talk  
3 to attorneys? Yeah.

4 Q Because that's where you get your  
5 business; right? Lawyers call you up?

6 A Sure.

7 Q Okay. But, I guess, and I'll try and  
8 rephrase my question to be more specific.

9 Have you given presentations to  
10 groups of lawyers who are interested in suing  
11 tobacco companies?

12 A You know, I never ask them. I have not  
13 given one, as of yet, no.

14 Q But you are going to give one, aren't you?

15 A Sure.

16 Q On Sunday, April 28, 2002, you are going  
17 to be making a presentation in front of the 18th  
18 Annual International Conference of Tobacco Products  
19 Liability Project; right?

20 A Yes.

21 Q The name of that presentation is "How to  
22 Win a Giant/Just Tobacco Verdict"; right?

23 A That's what they call it.

24 Q And the afternoon session in which you are  
25 speaking is called "The Keys to Giant Verdicts".

1 Isn't that right?

2 A No. Nope, That's not what I'm speaking  
3 about.

4 Q I'll show you what's marked as Defendant's  
5 Exhibit 2350. I'll show you Page 2, the top of the  
6 page, about a quarter of the way down, to your name.

7 A You know --

8 Q Is that what it says, Mr. Johnson?

9 A No. That's from Madeline Chamber. That's  
10 not me.

11 Q Take a look at the top of it. It covers  
12 the whole afternoon session, doesn't it?  
13 Ms. Chamber's presentation is: Getting Past Victim  
14 Blaming; isn't that right?

15 A Yeah. And mine says: Forensic Economics  
16 and Punitive Damages --

17 Q That's really why you are here,  
18 Mr. Johnson?

19 A Can I finish, counsel?

20 Q Yes. Yes, sir.

21 A The one that says, 1:00 to 1:30, The Keys  
22 to Giant Verdicts, Madeline Chambers.

23 Then it has two other people speaking  
24 on that part.

25 Then it has me. It says: Forensic

1 Economics and Punitive Damages. If you go to the  
2 first part, in other words, the morning half, the  
3 first half.

4 The second half is supposed to be:  
5 The Keys to Giant Verdicts. Then you would assume  
6 that would be a topic general for the first half.

7 All it says is: Welcome; continental  
8 breakfast; moderator's introduction. That's why I  
9 know that, Keys to Giant Verdicts, that's the  
10 attorney Chambers.

11 Q Would you have agreed to make your  
12 presentation if you knew that was the afternoon  
13 session, Keys to Giant Verdicts?

14 A No.

15 Q You wouldn't have agreed to do that?

16 A No, because that's not what I'm doing.

17 Q Thank you very much, Mr. Johnson?

18 A Sure.

19 MR. DUMAS: That is all I have.

20 THE COURT: All right. Thank you.

21 Counsel, do you have just a few questions?

22 MR. TAUMAN: I do.

23 THE COURT: All right.

24

25

REDIRECT EXAMINATION

BY MR. TAUMAN:

Q      Mr. Johnson, Mr. Dumas brought to your attention consumption The observe, that when stock prices go up the stock prices go down, didn't he?

A      They do.

Q      And Philip Morris stock price, does it go up or does it go down?

A      Well, between the analysis that we did for the market cap, which was as of February 22nd and as of close of business February 26, yesterday, the price has gone up.

So, the number I utilized for the market capitalization, instead of \$114 billion, theoretically, it should have been \$116 billion, but, as I said, I used the more conservative method.

Q      And over the years, just as a friend, the years that were shown on the graph, from 1998 to the present time, in which direction has Philip Morris stock trended?

A      Up.

Q      Now, you also mentioned when Mr. Dumas questioned you that the best way of determining the



1    value of a corporation, I believe you said, is find  
2    out what the numbers say?

3            A      Yes.

4            Q      Why didn't you simply do that in this  
5    case?

6            A      They haven't disclosed it. They haven't  
7    put in what they value their brands at. They  
8    haven't put in what their assets are, domestic.  
9    They haven't put in what their liabilities are.  
10   They haven't put in how much cash they have. They  
11   haven't put in how much their line of credit they  
12   have. They haven't put in specifically breaking up  
13   what their marketing expense is. They haven't put  
14   in what their contributions to any of the parent  
15   company's specific financial allocations of how they  
16   spend their money. I would love to have that to  
17   give a better, fuller more complete picture of the  
18   financial condition of Philip Morris, but they have  
19   chosen not to present it.

20           Q      Well, maybe they just don't know that  
21   information.

22                MR. DUMAS: Objection, Your Honor.  
23                Counsel is testifying.

24                THE COURT: Counsel, I'll sustain that  
25   objection.

1    BY MR. TAUMAN:

2            Q      Is it possible that they just don't know  
3    that information?

4            A      I don't believe so, no.

5            Q      Now, two other things that Mr. Dumas  
6    questioned you about specifically in the, in the, I  
7    guess, the travel from gross profit to net profit,  
8    were specifically taxes and interest.

9            A      Yes.

10          Q      Were those disclosed by Philip Morris for  
11    Philip Morris USA?

12          A      Nope.

13          Q      And they know those?

14          A      Sure.

15          Q      Now, Mr. Dumas asked you to accept some  
16    assumptions, hypotheticals, he called them, about  
17    other cases that were filed against Philip Morris  
18    USA. I'm going to ask you to accept some realities  
19    here.

20                    Do you know whether Philip Morris has  
21    ever paid a dime, a nickel or a penny in a case, any  
22    of the cases that Mr. Dumas mentioned that were  
23    reported, have they ever paid a dime, a nickel or a  
24    penny?

25          A      I saw no indication of any payment for any

1    of those cases.

2            Q    Have they ever accepted responsibility to  
3    pay a dime, a nickel or a penny any of those cases?

4            A    I saw no documentation of their  
5    acceptance.

6            Q    But they did pay in the cases that were  
7    brought by the states, didn't they?

8            A    Yes.

9            Q    And they paid a total of some billions of  
10   dollars, didn't they?

11          A    To my understanding, yes.

12          Q    How did they get this money?    How did they  
13   get this money to pay this settlement?

14          A    It comes in through their revenues.  
15   That's where it all starts.

16          Q    And what did they do to the price of the  
17   products that they sell in order to get this money?

18          A    Well, as their, quote/unquote, "expenses"  
19   increased, they raised the prices, even more than  
20   the expenses, which is why the increases in the  
21   overall operating profit of the domestic tobacco  
22   companies has increased, as they have had these  
23   other outside expenses.

24          Q    Now, Mr. Dumas asked you about working for  
25   the dreaded plaintiffs' firms.    Have you done other

1    work? Do you only work for plaintiffs' lawyers?

2            A    No. I work for defense and plaintiff.

3            Q    And can you tell the jury just a couple of  
4    the cases that you have worked on for defense  
5    lawyers that they may even recognize?

6            A    Sure. There's the MGM Grand Hotel fire  
7    from Lloyds of London. There's the Chicago DC10 Air  
8    Disaster for American Airlines. And then there's  
9    the -- we worked for the NFL when they fired the  
10   ref.

11          Q    Now, Mr. Dumas asked you, finally, about  
12   trends. And, of course, trends are important in the  
13   evaluation of a company. Because if a company is on  
14   the rise, their value goes up.

15          A    Yes.

16          Q    If a company has a bleak future, their  
17   value may go down.

18          A    Correct.

19          Q    What about Philip Morris? What about the  
20   charts that we have seen. Is that a company  
21   descending or a company on the rise?

22          A    The dollar figures for both revenue,  
23   sales, operating income are all increasing. In  
24   other words, the amount of money they get in for  
25   their goods and services, the amount of money they

1 keep after expenses, after the goods and services,  
2 are all continuing to go up, year after year after  
3 year, '98, '99, 2000. They are all going up.  
4 Revenues continue to increase.

5 Q And recently there's been a projection for  
6 this calendar year; is that correct?

7 A That's correct, yes.

8 Q And what did Philip Morris project as far  
9 as this calendar year?

10 A They project an increase. They do.

11 MR. TAUMAN: Thank very much, Doctor,  
12 Mr. Johnson.

13 MR. DUMAS: Your Honor, I have one very  
14 brief matter.

15 THE COURT: All right. Certainly.

16 MR. DUMAS: Thank you.  
17

18 RE CROSS-EXAMINATION  
19

20 BY MR. DUMAS:

21 Q Counsel asked you, Mr. Johnson, raised  
22 with you the settlement. He was referring to the  
23 settlement in 1998 that Philip Morris, Incorporated  
24 had with the 50 Attorney Generals of the states in  
25 this country; correct?

1 A I don't know.

2 Q You don't know?

3 A I don't know if it was that specific  
4 settlement. I thought he was referring to, when he  
5 talked about the individual settlements, I thought  
6 he was talking about the 1500 that you mentioned,  
7 which was the same number. I know the number in  
8 2001 is about 1500. The same number in 2000 was  
9 like half of that number the year before that.

10 Q Mr. Johnson, isn't it true, my last  
11 question, that a willing buyer of Philip Morris,  
12 Incorporated would want to understand the financial  
13 obligation that Philip Morris has under the Master  
14 Settlement Agreement with the 50 Attorney Generals  
15 to pay over \$248 billion dollars to the states over  
16 25 years, wouldn't a willing buyer want to know that  
17 about Philip Morris' obligations?

18 MR. TAUMAN: Your Honor, I object to that.  
19 First of all, counsel is testifying. Second of  
20 all, he's testifying inaccurately, which is the  
21 worst part about it. So those facts that he's  
22 testifying to have no bearing to reality.

23 THE COURT: All right.

24 Counsel, do you want to make it a  
25 hypothetical?

1 MR. DUMAS: I will make a hypothetical,  
2 Your Honor. Thank you.

3 BY MR. DUMAS:

4 Q Mr. Johnson, isn't it true that a willing  
5 buyer, interested in purchasing Philip Morris,  
6 Incorporated, would be very interested in knowing  
7 that Philip Morris has to pay approximately  
8 50 percent of the \$248 billion-dollar Master  
9 Settlement Agreement with the 50 Attorney Generals  
10 over the next 25 years?

11 A That's already public knowledge.

12 Q And wouldn't a willing buyer want to know  
13 that, in assessing a fair market value for Philip  
14 Morris, Incorporated?

15 A They would want to know that and the  
16 impact that it's had.

17 MR. DUMAS: Fair enough. Thank you.

18 That's all, Your Honor.

19 THE COURT: All right.

20 You may step down. Thank you very much.

21 You are free to go.

22 And, members of the jury, you are free to  
23 relax. I want you to be back at 1:25.

24 Are we going to have some information for  
25 them at 1:25, some more testimony for the jury?

1 MR. DUMAS: I'm sorry. What?  
2 THE COURT: More testimony for the jury at  
3 1:25?  
4 MR. DUMAS: Yes, sir.  
5 THE COURT: All right.  
6 Be back in the jury room at 1:25.  
7 The jurors are ready to go. They were  
8 ready to jump up and relax.  
9 Court is out of session.  
10 \* \* \*  
11 (Whereupon, after the lunch recess,  
12 the proceedings continued, as follows:)  
13 \* \* \*  
14 THE CLERK: Please remain seated. Court  
15 is in session.  
16 THE COURT: Just remain as you are.  
17 MR. WOBBROCK: Good afternoon, Your Honor.  
18 THE COURT: Good afternoon, counselor.  
19 MR. WOBBROCK: I have a matter for the  
20 Court, if I might.  
21 THE COURT: Proceed, please.  
22 MR. WOBBROCK: We have a rule against  
23 witnesses invoked, that has been invoked in  
24 this case since probably about after about the  
25 first two witnesses.



1           Now I see a prospective witness sitting  
2 back here who may look familiar because he's on  
3 the videotape of the Waxman Committee Hearings,  
4 Mr. Burnley, I understand.

5           Good afternoon, sir. I don't mean to  
6 speak about you as if you are not here.

7           MR. PHILLIPS: Even though I am.

8           MR. WOBBROCK: Counsel tells me it's his  
9 intention to have Mr. Burnley here in addition  
10 to Mr. Pallant. Mr. Burnley is on the witness  
11 list, and he's, therefore, going to listen to  
12 the next witness, Mr. Whidby, or Dr. Whidby.

13          And, I'm sorry, sir, maybe it's Dr.  
14 Burnley. I'm not so sure. Okay.

15          Dr. Whidby.

16          And Mr. Burnley is going to be here. I  
17 think that violates the rule against witnesses.

18          Counsel tells me, well, you had your  
19 clients in here.

20          The way that matter came about is, as  
21 Richard Schwarz, who was hanging onto his son,  
22 walking up to the witness stand, counsel said  
23 to me, what about all of these other people? I  
24 said it's a little late for that. And we went  
25 ahead. If he wanted to raise it, he could

1 have. But I think it is improper.

2 We are going to see a rotating corporate  
3 representative, in addition to Mr. Pallant, and  
4 I don't want Mr. Pallant's job to be  
5 jeopardized. He's here for some purpose. I  
6 don't think they can do that, Your Honor. And  
7 I object.

8 MR. PHILLIPS: Let me respond, Your Honor.  
9 And let me -- I don't appreciate being  
10 unfriendly.

11 I want to introduce Mr. Burnley who is  
12 here and who has arrived here for his testimony  
13 which will likely be tomorrow.

14 As usual, memories can differ. When we --  
15 we invoked the no-witness rule at the outset of  
16 the case. And when Mr. Wobbrock arrived with  
17 the entire family, I said: Larry, there's a  
18 no-witness rule. What are all of these people  
19 doing here? He said: These are my clients,  
20 and they are going to be here. And he huffed  
21 and puffed. I said: That's fine; what's good  
22 for the goose is good for the gander.

23 And that's all I'm doing.

24 I mean, I have a client who's traveled  
25 3,000 miles to be here for the case. I know

1 that Mr. Wobbrock prefers thinking about wants  
2 Philip Morris as an impersonal, abstract  
3 entity.

4 It is composed of people, clients, like  
5 Mr. Burnley who are here to testify. There are  
6 only actually two or three people who are  
7 actually current employees of Philip Morris.  
8 Those are the people. If they desire to be  
9 here in the courtroom, having made the trip to  
10 testify, it seems to me, I should that have  
11 right to have my client representative or even  
12 my client representatives here.

13 That is no different than Mr. Wobbrock  
14 having his clients here as long as they wanted.  
15 In fact, if they showed interest, they would  
16 have been here the entire time, and there  
17 wouldn't have been any objection to it.

18 They came. They watched their own family  
19 members testify for an extensive period of  
20 time. I raised the issues. And he said:  
21 These are my clients. They are going to be  
22 here. Mr. Burnley is my client. He should be  
23 here.

24 THE COURT: All right.

25 Counsel, I think there's one distinction.

1 And, hopefully, it is not another one of those  
2 distinctions without a difference.

3 The family testimony is really not very  
4 substantive of getting to the issues in the  
5 case.

6 Counsel know what a family is going to  
7 say. She was my mother. I loved her. She did  
8 all of these wonderful things.

9 Generally, when a family comes to testify  
10 about another family member, we generally  
11 already know what they are going to say. They  
12 generally don't have any technical knowledge or  
13 anything to really -- to really offer.

14 A more substantive witness who actually  
15 has technical information to offer is different  
16 than -- is different than a family member who  
17 are just going to tell you how much they love  
18 their momma or how much they loved their dad or  
19 son. We could say we already know that before  
20 you came in, that you loved your mom or you  
21 miss her or something like that.

22 But technical things, I have a little bit  
23 more concern about that because sometimes  
24 people from the same company may testify  
25 differently on a different issue because of

1 their connection to a certain segment of the  
2 company, their expertise in that area.

3 And another person might have another  
4 expertise in another area of the company in  
5 doing that.

6 And I don't -- if the exclusion of  
7 witnesses is effective, then I don't like one  
8 witness sitting and listening to the other  
9 witness's testimony.

10 Family members are not too bothered by  
11 that because, as I said, we, generally, we all  
12 know what they are going to say and nobody is  
13 surprised about what they said.

14 MR. PHILLIPS: If I could have a brief  
15 response, Your Honor?

16 THE COURT: Certainly, counsel.

17 MR. PHILLIPS: I guess it is all in the  
18 eye of the beholder.

19 I mean, Your Honor thinks that this case  
20 is about Philip Morris. We actually think it  
21 is about Michelle Schwarz. And all of the  
22 substantive evidence in this case has actually  
23 come in through the family members and no one  
24 else. So, that's a perspective difference.  
25 Okay?

1           With respect to the family members, they  
2 sat there. They watched me. They watched Mr.  
3 Dumas cross-examine. They thought about it.  
4 They took in all of that, and they appreciated  
5 it for purposes of their testimony, and we  
6 heard some things we had never heard before in  
7 the depositions.

8           Now, Mr. Wobbrock is sitting here, with 15  
9 depositions from Mr. Burnley or 15 trial, or 10  
10 trial testimonies, or however many trials he  
11 has ever testified in. He knows what  
12 Mr. Burnley has testified to before.

13           So on both points that you are trying to  
14 make for purposes of a technical distinction, I  
15 don't see it.

16           In fact, I knew as much about his  
17 witnesses as he knows about my witnesses. I  
18 happen to represent a corporation. He happens  
19 to represent individuals.

20           They sat in the courtroom for their  
21 testimony and for their loved ones' testimony.  
22 And they took whatever benefit of that was.  
23 And he insisted that he had a right to do that.

24           Now, unless we are going to make a  
25 distinction between corporations and

1 individuals, what you are making is a  
2 distinction without a difference.

3 THE COURT: I thought you would probably  
4 say this, counsel. I respectfully disagree  
5 with you, but, as a good advocate for your  
6 position, I accept your argument. I disagree  
7 with it.

8 MR. PHILLIPS: All right.

9 Would you like Mr. Burnley to leave?

10 THE COURT: And the witness will be  
11 excluded.

12 MR. PHILLIPS: All right.

13 THE COURT: Other issues that we have?

14 MR. PHILLIPS: We have a motion for  
15 directed verdict.

16 Excuse me. Have you rested?

17 MR. TAUMAN: Oh, sorry.

18 Your Honor, subject to the issues that we  
19 raised yesterday regarding the exhibits'  
20 admissibility, we rest. We have no further  
21 witnesses.

22 THE COURT: All right.

23 Now somebody help me.

24 MR. PHILLIPS: I think I can help you,  
25 Your Honor.

1 THE COURT: You gentlemen were supposed to  
2 do a lot of work on some exhibits.

3 MR. PHILLIPS: Yeah. There are five or  
4 six exhibits that are left to talk about. And  
5 they are either redactions or withdrawals. I  
6 don't think they are material to the question  
7 of a directed verdict motion.

8 And Mr. Lane is going to look at the list  
9 I gave him tonight. And if there are any other  
10 issues, we can pick them up in the morning. I  
11 think there will be none.

12 And subject to his confirming that, then  
13 we will need to -- they will need to provide a  
14 list that shows all of the ones that have been  
15 excluded and the ones admitted in light of the  
16 Court's orders yesterday.

17 THE COURT: All right. Very well.

18 MR. TAUMAN: I should add, before I -- one  
19 additional caveat, and that is that  
20 Mr. Phillips, on behalf of Philip Morris, has  
21 agreed to additional exhibits that may be, that  
22 the court may take judicial notice of and both  
23 parties may use. And so those are the three  
24 tables that were attached to the motion for  
25 judicial notice.



1           So, we, I guess, stipulate the Court may  
2       take judicial notice of those three tables and  
3       that they are part of the substantive evidence  
4       in the case.

5           Is that correct?

6           MR. PHILLIPS: Yes. There are three  
7       tables that I agreed that the Court could  
8       judicially notice and could be referenced by  
9       the parties.

10          THE COURT: And is that mortality table?

11          MR. TAUMAN: I think they are listed by  
12       number.

13          THE COURT: 661, 662, and 663.

14          MR. TAUMAN: Correct.

15          THE COURT: All right.

16          And I presume the plaintiff may want to  
17       rest before the jury. Or does it make any  
18       difference to you?

19          MR. TAUMAN: No, it really doesn't make  
20       any difference.

21          MR. WOBBROCK: I think we should, Chuck.

22          MR. TAUMAN: All right. We can do it  
23       formally. I'm just concerned when the motion  
24       is going to be dealt with.

25          THE COURT: We will deal with that. I

1 will bring them in. You rest. And I will send  
2 them back.

3 MR. TAUMAN: Okay.

4 THE COURT: And we will deal with the  
5 motion then.

6 MR. TAUMAN: That will be fine.

7 THE COURT: Do you have an exhibit for the  
8 judicial -- this notice material? Do you have  
9 something that will be going to the jury?

10 MR. TAUMAN: I can -- I think we are on  
11 2016. So those will be 2016, 2017 and 2018.

12 I don't have anyone to bring this up to  
13 you.

14 THE COURT: All right. I'll let the jury  
15 know that the Court is taking judicial notice  
16 of that.

17 And are both sides indicating that this  
18 information on Page 1, the judicial notice, the  
19 Court should read that to the jury?

20 MR. TAUMAN: No. That was not part of the  
21 instructions. The draft instructions were not  
22 part of the stipulation. We can request  
23 instructions at some later time. They did not  
24 agree to the instruction part, just the  
25 judicial notice of the document.

1 THE COURT: Of the mortality table.

2 MR. TAUMAN: Exactly.

3 THE COURT: All right. Very good. That's

4 all I wanted to know.

5 \* \* \*

6 (Whereupon, the proceedings continued,

7 in the presence of the jury, as follows:)

8 \* \* \*

9 THE COURT: All right. Thank you. I  
10 think we have everybody there. All right.

11 Members of the jury, the Court is going to  
12 take judicial notice of the mortality table.  
13 That will be three separate pages.

14 And some of that means that the defense  
15 and the plaintiff, there's no disagreement on  
16 these numbers and these figures. So,  
17 consequently, either side can use it in their  
18 presentation. And you will have it available  
19 for your consideration, also, but we won't be  
20 calling a witness to testify about this. And  
21 they will have the exhibits' numbers.

22 Counsel, what will those numbers be?

23 MR. TAUMAN: I think 2016, 2017 and 2018.

24 THE COURT: Very well. All right. They  
25 will be accepted.

1 Counsel.

2 MR. WOBBROCK: Your Honor, subject to the  
3 resolution of issues regarding documentary  
4 exhibits, the Estate of Michelle Schwarz rests.

5 THE COURT: All right. Thank you.

6 All right. Members of the jury, the  
7 plaintiff has rested their case. That means  
8 there are some legal issues that we need to  
9 take care of right now.

10 So, you get to, I just brought you back in  
11 briefly, you get to go back and relax in the  
12 jury room. And we'll take care of these  
13 issues, and hopefully bring you back in when we  
14 need you again, hopefully before the end of the  
15 day.

16 \* \* \*

17 (Whereupon, the proceedings continued,  
18 out of the presence of the jury, as follows:)

19 \* \* \*

20 THE COURT: Counsel for the defense, you  
21 may proceed.

22 The Court has before it a copy of your  
23 Motion for Directed Verdict that you presented  
24 to the Court. And I have had a small amount of  
25 time just to briefly review that, but I know

1 you want to make your own presentation.

2 Proceed, counsel.

3 MR. PHILLIPS: Thank you, Your Honor.

4 I will be reasonably brief. I'll be  
5 reasonably brief, Your Honor.

6 THE COURT: All right.

7 MR. PHILLIPS: We have heard evidence over  
8 the last three or four weeks. And the question  
9 is: Are there any issues in the case or is  
10 there any entire portions of the case which can  
11 be removed based on the evidence that we have  
12 heard, either on a complete directed verdict or  
13 for partial directed verdict?

14 Let me start by saying, and I believe that  
15 Mr. Wobbrock has already represented this to  
16 me, and we have got a record on this, that  
17 their complaint makes a claim for lost income.  
18 There was no evidence on lost income in the  
19 plaintiff's case. I believe that they have  
20 dropped that claim. And that should be removed  
21 from the case.

22 The next way that I look at it, Your  
23 Honor, is essentially looking back at the  
24 arguments that we had many months ago on  
25 summary judgment. And at the time I suggested

1 to the Court that there were -- there was an  
2 absence of proof with respect to some pivotal  
3 elements and in particular with respect to  
4 fraud and reliance.

5 And, at the time, the Court said I'm going  
6 to wait and give them a chance to put their  
7 evidence on, and we'll see where we are. And I  
8 think we have now arrived at that point.

9 What I would like to do is to go through  
10 the fraud allegations in the complaint and  
11 assess from my own perspective whether there is  
12 any evidence that would allow this case to  
13 proceed past a directed verdict at the close of  
14 the plaintiff's case.

15 When you look at the complaint, it has a  
16 reference to one, two, three, four, five, six,  
17 seven, eight, nine subparagraphs of alleged  
18 fraudulent representations, fraudulent or  
19 half-truth representations to Michelle Schwarz  
20 and upon which the plaintiff has alleged that  
21 she relied.

22 And when we were here many months ago the  
23 evidence was that she had seen the 1994  
24 videotape, which the jury has seen, and she may  
25 have read some articles which may have included

1 some representations or statements by either  
2 Philip Morris or the Tobacco Institute in  
3 articles. There was no actual evidence. More  
4 of a circumstantial evidence that she may have  
5 actually read them.

6 Now, with respect to those two things, at  
7 the conclusion of the plaintiff's case, we have  
8 all of the evidence the Court is going to hear  
9 on that question.

10 And what is it?

11 In 1994, there's evidence that Michelle  
12 Schwarz watched that program with her husband.  
13 Her husband quite candidly said he thought it  
14 was fraudulent, or perjurious, I think was the  
15 term he actually used, and he had no reason to  
16 believe his wife felt any differently.

17 Dr. Benowitz testified that he thought no  
18 experienced or long-term smoker would have  
19 agreed with that statement in 1994. And he  
20 agreed that's what Michelle Schwarz was.

21 So now we have filled in the picture a  
22 little bit about whether there's actual  
23 reliance with respect to fraud. And there is  
24 absolutely none.

25 In fact, the only evidence is that she did

1 not rely. Dr. Schwarz, Dr. Benowitz, both of  
2 them basically said she didn't or wouldn't have  
3 relied upon that statement with respect to  
4 making any decisions in her own life.

5 So, that, we should have summary judgment  
6 on that allegation. And, frankly, we should  
7 have summary judgment with all of the other  
8 fraud allegations for the same reason.

9 1954, Frank Statement. We have heard  
10 about it. We have seen it many, many times.

11 The first three allegations of the fraud  
12 claim, 15 A, B and C, all relate to either the  
13 Frank Statement or statements about the Frank  
14 Statement.

15 What is the record regarding anything that  
16 Michelle Schwarz ever heard or relied upon with  
17 respect to the Frank Statement?

18 Dr. Schwarz said I know it is in my  
19 complaint; I have never heard of it before.  
20 And he has no reason to believe that Michelle  
21 Schwarz had ever heard of it before.

22 There's absolutely no record of actual  
23 reliance, in this case, let alone ever actually  
24 having heard the representation by Michelle  
25 Schwarz.



1 Therefore, under classic fraud principles,  
2 where actual reliance by the decedent is  
3 required, these allegations should be stricken  
4 from the complaint or withdrawn.

5 The remaining allegations, Your Honor, are  
6 of the same cloth.

7 15D, a 1962 statement by Joseph Cullman to  
8 the stockholders, no evidence that she ever saw  
9 it, she ever heard it, she ever relied upon it.

10 15E, 1963 statement by Philip Morris  
11 executive assistant James Bowling to Thomas  
12 Whiteside in the New Yorker. No evidence she  
13 ever heard, she ever saw it, she ever relied  
14 upon it.

15 15F, the causal link between cigarette  
16 smoking and human disease was in doubt or had  
17 not been proven over the past 15 years.

18 Maybe some evidence that she read  
19 something somewhere, very circumstantial.  
20 Absolutely no evidence she ever relied upon it  
21 in any respect.

22 The evidence in this case, and it was  
23 consistent, and it was a drum beat from the  
24 plaintiff's own witnesses, that she knew that  
25 smoking could kill her. She knew it could

1 cause lung cancer. And she knew it was  
2 addictive. Over and over again. No  
3 contradictory evidence, Your Honor.

4 15G, the defendant always had and always  
5 would cooperate closely with those whose task  
6 it is to safeguard the public health.

7 That's right out of the '54 Frank  
8 Statement. Again, no actual evidence that she  
9 ever saw, heard or relied upon it.

10 So, and 15H is to complete the picture.  
11 That's the '94 Congressional hearing.

12 15I is the light cigarettes allegation.  
13 Let me put that one to the side for a second,  
14 because I think that gets a little more  
15 complicated. I think there's more to that  
16 allegation than everything else that I have  
17 gone through.

18 As to everything else, the evidence really  
19 is that Michelle Schwarz knew that smoking  
20 could cause lung cancer, knew that smoking was  
21 addictive.

22 In fact, Dr. Benowitz said that, by 1968,  
23 she would have understood that she was addicted  
24 because any smoker who tries to quit and fails  
25 knows they are addicted. And we know from the

1 evidence that she started -- she made an  
2 attempt in 1968.

3 So, we have the evidence on the  
4 plaintiff's side showing this woman understood  
5 that smoking could cause lung cancer, could be  
6 addictive, and in fact that she was addicted by  
7 1968, on their evidence.

8 No evidence of reliance.

9 And if reliance means anything in the  
10 context of fraud, which requires clear and  
11 convincing evidence, if this is not going to be  
12 just a general diatribe against Philip Morris  
13 and its actions over time against the entire  
14 American public, which is really the case that  
15 we have heard, it is the punitive damages case,  
16 Your Honor, without actually an underlying or  
17 an underpinning liability case.

18 And you need to start and any plaintiff  
19 has the obligation to be able to show that  
20 actual reliance occurred on behalf of Michelle  
21 Schwarz. And they have not shown that as to  
22 any of these allegations. None of them.

23 Let me turn to the light cigarettes  
24 allegation, because I think it has got more  
25 steps to it. It is not as simple as she never

1 heard it. She never saw it. And that's true  
2 for all of those, except for the '94 one where  
3 she saw it but she obviously didn't believe it,  
4 based on their own testimony.

5 On the light cigarettes allegation, what  
6 is the evidence we have got?

7 Well, we have got evidence that she saw  
8 ads. We actually don't know what ads she saw.  
9 They showed some ads to the jury. They have no  
10 idea whether she saw those ads or some other  
11 ads. But, presumably, there is circumstantial  
12 evidence that she saw ads.

13 There is also circumstantial evidence that  
14 she saw, excuse me, that she thought that  
15 low-tar cigarettes were less hazardous. I  
16 think there's clearly evidence of that for  
17 purposes of evaluating this directed verdict  
18 motion.

19 The question then is: Is there evidence  
20 that she relied on something Philip Morris said  
21 about those cigarettes being less hazardous for  
22 purposes of making her smoking decision?

23 And the answer to that, Your Honor, is we  
24 haven't the slightest idea, because we know  
25 that she was a reader.

1 And just as much as there's circumstantial  
2 evidence that she saw advertisements, there is  
3 equally forceful circumstantial evidence that  
4 she saw or would have seen the variety of  
5 public health announcements which said  
6 explicitly, not through inference or counsel  
7 argument, that low-tar cigarettes are in fact  
8 less hazardous, are safer, not, you know, look  
9 at what they are, how they are using this  
10 number or think about the sort of atmosphere of  
11 this particular ad and there's a suggested  
12 implied health claim.

13 The public health authorities actually  
14 said, over and over again, in broad public  
15 media to people like Michelle Schwarz.

16 So, the critical problem with that fraud  
17 claim, Your Honor, is that there really isn't  
18 any evidence that shows that the reason that  
19 she thought it was less hazardous was because  
20 of anything that Philip Morris did,  
21 particularly in light of the broader and far  
22 more credible statements by the public health  
23 community that they were less hazardous, that  
24 they were in fact something that could reduce  
25 the risk of disease.

1 Now, Dr. Burns said she would have died at  
2 the same time had she taken Benson & Hedges or  
3 Merit cigarettes. In his view, it is sort of,  
4 you know, take the six of one, half a dozen of  
5 the other.

6 There's no evidence that she would have  
7 quit had she not gone to Merit cigarettes. No  
8 evidence.

9 No evidence from any of the family members  
10 that she would have quit had she not switched  
11 to Merits.

12 In other words, the evidence today is that  
13 she would have either continued with Benson &  
14 Hedges or she might have gone to another brand  
15 which also Dr. Burns would say is equally  
16 dangerous from his perspective today, in the  
17 year 2002.

18 As to the only commercial products that  
19 exist, the ones that we have heard about that  
20 someone has said something not completely  
21 condemning of, the ultra-low products, that Dr.  
22 Benowitz said or maybe 30 to 50 percent less  
23 risky, she never tried them.

24 So, we don't have any evidence here that  
25 really establishes causation or reliance based

1 on what Philip Morris said or did with its  
2 advertisements for purposes of surviving a  
3 directed verdict motion.

4 That one is a little more complicated  
5 because there are different steps. There is  
6 actually evidence that she has to believed that  
7 they were less hazardous.

8 Then we had to answer the question or ask  
9 the question and answer it: Why?

10 And there we are left to complete  
11 speculation as to why.

12 And the speculation is equal in terms of,  
13 frankly, from my perspective, it is actually  
14 much more likely that a woman of Michelle  
15 Schwarz' intelligence would have relied upon  
16 what people like Dr. Burns were telling her in  
17 1976, in articles, in newspapers, in the kind  
18 of television news that the jury has seen thus  
19 far, than she would have relied upon the  
20 advertisements.

21 This is putting to the side completely the  
22 substance of the advertisements. It is just  
23 the question of cause.

24 I think when we get to the question of  
25 whether the advertisements were or were not

1 misleading, that gets me to a issue of debate  
2 that I don't think I can really survive for  
3 purposes of a motion for directed verdict.  
4 I'll have to carry that burden in my own part  
5 of the case if that is the issue.

6 But what I'm focussing on with Your Honor  
7 is simply the fact that there's actually no  
8 evidence that connects her reasons with Philip  
9 Morris, particularly given the much broader  
10 information environment, much more credible  
11 information environment in which that was being  
12 said.

13 Your Honor, with respect to the product  
14 liability count, and let me say we have argued  
15 these issues, and I don't want to overplay my  
16 hand here.

17 I think it is harder for us to prevail on  
18 a directed verdict with respect to the product  
19 liability count and the negligence counts.

20 With respect to the negligence count, let  
21 me start there. The negligence count, Your  
22 Honor, makes an argument regarding safer  
23 cigarettes. And I tried to carefully observe  
24 the witnesses regarding safer cigarettes.

25 What did we really hear in that regard?



1 Well, we heard from Dr. Farone, as you  
2 pointed out and corrected me on a question,  
3 that he believes that the commercial cigarettes  
4 that were the ultra-low cigarettes were  
5 actually cigarettes that were at least somewhat  
6 safer than Merit or the higher-tar brands.

7 He said that, of course, the problem with  
8 that, of course, is that they were available  
9 and she didn't try them. In fact, her father  
10 was smoking one of those brands when he died or  
11 in the years prior to his dying. So, we know  
12 she was aware of it, but she didn't select the  
13 really ultra-low brands. But there's no  
14 question that they were available to her.

15 There is also some evidence that Dr.  
16 Farone says that, well, you can make that  
17 cigarette more palatable, more acceptable, if  
18 you put nicotine into the filter so that the  
19 smoker would get more nicotine.

20 And Dr. Benowitz also testified and  
21 explained that, in fact, that's one of the  
22 theories that's been espoused in the public  
23 health community, that, one, and he disagreed  
24 with it, but one of the theories that you  
25 actually put nicotine into the cigarette.

1 But Dr. Benowitz also acknowledged that  
2 that couldn't be done in a free market because  
3 when you put new substances like nicotine into  
4 the cigarette it would likely be regulated by  
5 the Federal Drug Administration and is equally  
6 likely if it were regulated by the Federal Drug  
7 Administration, Food and Drug Administration,  
8 excuse me, that it would be banned because  
9 under the Food and Drug Administration's  
10 current regulations they would be required to  
11 conclude that the product is not safe. It  
12 bears the Surgeon General's warnings. And,  
13 therefore, it couldn't be sold. And, certainly  
14 from Dr. Benowitz' perspective, even the  
15 ultra-low brands are not safe. And, certainly  
16 from Philip Morris' perspective, they are not  
17 safe.

18 We also heard from Dr. Benowitz that he  
19 thinks this way of making a safer cigarette is  
20 to bring the entire market down.

21 He acknowledged that Philip Morris has  
22 offered products like DeNic, Next, that weren't  
23 successful. He acknowledged that Cambridge and  
24 Merit Ultima, I'm not sure if he went with me  
25 all the way on Merit Ultima, but he sort of

1 talked about the really ultra lows as being  
2 brands that really have a chance for success  
3 but not in the current marketplace, because in  
4 the current marketplace as long as you give  
5 consumers choices consumers will choose other  
6 products.

7 So, the burden of Dr. Benowitz' testimony  
8 regarding a safer cigarette, as well, was that  
9 if you change the regulatory environment we can  
10 be successful.

11 That's not a standard, however, for  
12 purposes of establishing negligence in the  
13 absence of that regulatory environment.

14 And if we go forward in this case beyond  
15 this motion, there will be testimony about the  
16 FDA regulation and so forth.

17 But what we have to evaluate for purposes  
18 of negligence is whether or not the actions of  
19 Philip Morris were negligent and whether it  
20 could come out with a product that would have  
21 been successful, as opposed to the products  
22 that came out that their own witnesses said  
23 were doomed to not be successful in the current  
24 marketplace, whether they can be held negligent  
25 in the absence of such a regulatory environment

1 that actually existed.

2 So, we have heard evidence regarding what  
3 some people believe would be a safer cigarette.

4 There are some contradictions between Dr.  
5 Farone and Dr. Benowitz, but both of them are  
6 consistent in saying ultimately it would have  
7 to be done in a regulatory environment that  
8 doesn't exist and that didn't exist during  
9 Michelle Schwarz' smoking history.

10 The -- bear with me for a second, Your  
11 Honor.

12 On the assumed duty count, this is the  
13 introduced count that came out of the summary  
14 judgment practice, again, Your Honor, I think  
15 it is the same point with respect to the 1954  
16 Frank Statement in terms of absence of any  
17 reliance.

18 In order to have assumed a duty to  
19 Michelle Schwarz, she must have been aware of  
20 it and relied upon it and depended upon it with  
21 respect to her consuming decisions. And she  
22 obviously didn't. She wasn't aware of it. Her  
23 husband had never heard of it. And, yet,  
24 surprisingly, it showed up in his complaint.

25 Under the product liability count, Your

1 Honor, the burden of that motion really is  
2 that, under 402A and Comment I, Merit  
3 cigarettes, all cigarettes, are dangerous, are  
4 addictive.

5 And, in fact, barring the kind of new  
6 regulatory environment in which a product that  
7 had almost no nicotine or no nicotine could  
8 succeed because consumers wouldn't choose  
9 another product. This is Dr. Benowitz' theory.

10 All cigarettes are addictive. Even the  
11 low-tar cigarettes, even the ultra-low-tar  
12 cigarettes. And both -- and all cigarettes do  
13 cause disease. The Surgeon General's warnings  
14 make that absolutely clear. There's no  
15 variation.

16 And while there's been some testimony here  
17 about, you know, maybe she thought they were  
18 less risky, there certainly isn't any testimony  
19 that she thought that they were safe. Her  
20 family hounded her for 20 years after she  
21 switched asking her to quit and trying to help  
22 her quit.

23 Now, why did they do that? Because they  
24 knew that those cigarettes could kill her. And  
25 so did she.

1 The nicotine manipulation claim, Your  
2 Honor, what's the evidence on that?

3 Well, we don't have any testing of the  
4 Merit cigarettes by any of the plaintiff's  
5 witnesses.

6 Dr. Farone tested Merits to see if they  
7 had urea. That was it. No one took the  
8 product. No one tested it to determine whether  
9 or not what the specific pH of the product was,  
10 The cigarette smoke. Whether that pH actually  
11 had a material impact on the amount of the free  
12 nicotine in the smoke. And then what impact  
13 that would have on the smoker.

14 Dr. Benowitz said, you know, it's the same  
15 amount of nicotine. It's the same ratio that  
16 goes to the brain, because it all gets  
17 transformed by the pH of the blood. And,  
18 theoretically, it could change the rate of  
19 absorption, but I have no evidence of that. It  
20 is, theoretically, possible because free  
21 nicotine does go through the cell wall more  
22 quickly than bound nicotine.

23 But it all happens so quickly in the  
24 smoker that I don't know if there's any  
25 material or significant difference or not in

1 the transfer or the speed of transfer to the  
2 bloodstream.

3 So he has -- and I think that Philip  
4 Morris would concede that theoretical  
5 possibility, and it has in its own documents.

6 So, the question is: Does it actually  
7 happen in the Merit brand cigarettes?

8 I mean, we have to come back to the  
9 product that's at issue in this case and the  
10 burden of the plaintiff to show that, not  
11 through inference, not through skillful use of  
12 documents from here and there, and showing that  
13 these issues were aware of, and that pH can  
14 change the relationship nicotine being bound  
15 and free.

16 There are such documents. There's no  
17 question that that kind of experimentation went  
18 on. We didn't get much of a context for that  
19 experimentation here, but there's no question  
20 that that did occur at Philip Morris.

21 The question is: Does it have any impact  
22 on making Merit cigarettes more addictive?

23 And I think the answer, based on the  
24 evidence we have heard so far through the  
25 completion of the plaintiff's case, is it does

1 not, or at least there's no proof that it does.

2 On the issue of impact to the mouth, well,  
3 that's been acknowledged for decades, Your  
4 Honor. It really goes to the issue of smoke  
5 strength, impact to the mouth, how much you  
6 appreciate it.

7 And Dr. Benowitz said, well, yeah, that  
8 may have impact on the brain in terms of  
9 stimulation.

10 Well, it is just like when you drink a  
11 bottle of Coke, it is carbonated, and it  
12 tingles the back of your throat, and you have a  
13 sensation.

14 Now, does that make Coke more addictive?  
15 It may make it taste better for purposes of  
16 drinking coke.

17 But does it make it more addictive?

18 The whole theory of addiction here first  
19 was, and, of course, this is only this case,  
20 but it has been going on for seven years, Your  
21 Honor, it's a moving target, first it was more  
22 nicotine was going to the bloodstream, and they  
23 now agree that doesn't happen. Then it was  
24 more free nicotine gets to the brain.

25 MR. TAUMAN: Your Honor, I object to this.



1 He's reciting evidence from other cases, as  
2 he's acknowledged. Let's stick to this case,  
3 what the evidence was in this case, and  
4 continue with your motion.

5 MR. PHILLIPS: Your Honor, I can take  
6 account of what's been the evidence and  
7 whatnot. I'll get to the point.

8 THE COURT: Proceed, please.

9 MR. PHILLIPS: And, ultimately, the  
10 question is: Is there actually any evidence  
11 with respect to Merits in this case that show  
12 that Merits and the kind of nicotine made Merit  
13 brand cigarettes more addictive.

14 And more addictive than what?

15 A cigarette without apparently ammonia or  
16 sugar.

17 And there's been no comparative evidence  
18 in this case that shows that a regular  
19 cigarette would have been equally addictive or  
20 sufficiently addictive to keep Michelle Schwarz  
21 smoking as long as she smoked.

22 So, we have a theory. We have an idea.  
23 No application to the product, and no  
24 application to show causation in this case,  
25 Your Honor.

1 Your Honor, the other arguments that we  
2 have made in our -- well, let me deal with the  
3 failure to test claim, as well, because that is  
4 a specific allegation on the negligence count.

5 Failure to test Merit cigarettes. We  
6 didn't hear any evidence from any specific  
7 witness about what tests should have been  
8 performed on Merit cigarettes, what those tests  
9 would have shown, and how they would have been  
10 influential with respect to Michelle Schwarz'  
11 smoking decisions.

12 The allegation in the complaint is, if we  
13 tested, we would have found out something and  
14 we would have told her something.

15 She already knew smoking was addictive.

16 So, the question is: What else did she  
17 need to know that these tests would have  
18 revealed?

19 There's all kinds of documents about  
20 varied tests here and there. We heard a lot  
21 about Virginia Slims' sidestream smoke. What  
22 does that have to do with Merits cigarettes?

23 And none of it tied to the Merit brand  
24 cigarettes. None of it tied to the tests that  
25 would have been performed or should have been

1 performed.

2 We just know that they didn't do any tests  
3 on the Merit cigarettes to try to prove their  
4 case.

5 The other arguments we have got, Your  
6 Honor, really focus on the legal arguments I  
7 have made to you before regarding preemption.  
8 And I think you are thoroughly familiar with  
9 them. I don't want to reargue those, but again  
10 they come back into play with respect to your  
11 evaluation of the evidence here and whether a  
12 directed verdict is appropriate.

13 So, for those reasons, we would like, and  
14 we move the Court for a directed verdict with  
15 respect to specific allegations and to the  
16 entire complaint.

17 The specific allegations, certainly, the  
18 Court can choose those which it believes  
19 clearly there is not evidence and strike them  
20 from the complaint at this time. And the  
21 motion has both components to it, both in its  
22 entirety and in part.

23 Thank you.

24 THE COURT: All right. Thank you.

25 Counsel for the plaintiff, your

1 presentation.

2 MR. TAUMAN: Thank you, Your Honor.

3 Your Honor, certainly this motion wasn't a  
4 surprise. It happens in every tobacco case.  
5 It happens in every case of this --

6 MR. PHILLIPS: Your Honor, I think we  
7 should keep to this case. Don't you think?

8 THE COURT: We'll stick to this case,  
9 counsel.

10 Proceed.

11 He's just laying the foundation for the  
12 Court.

13 MR. TAUMAN: And my foundation was leading  
14 to the fact that, in terms of the legal  
15 argument that's -- we all sat through the same  
16 trial; although, apparently some of us didn't  
17 catch all of it.

18 But we were just served with the  
19 memorandum which contains the legal argument  
20 just a few hours ago, and I think we can  
21 respond adequately.

22 But I would like to take these in the  
23 order that Mr. Phillips presented them.

24 And, first of all, we have to look at, as  
25 Mr. Phillips indicated, the specific

1 allegations of the fraud claim, which are on  
2 Page 5 and 6 of the Second Amended Complaint.

3 And it is true, there's no question that,  
4 two things that Mr. Phillips said is true, and  
5 that is there was no evidence that Mrs. Schwarz  
6 saw directly any of the publications of Philip  
7 Morris in A through G.

8 We made the argument and continue that  
9 argument that there was a -- that this set in  
10 motion, these representations set in motion a  
11 form of common knowledge, and I'm sure that  
12 we'll hear some more about common knowledge  
13 during defendant's case, that then became  
14 transmitted to the public in general.

15 And there is a direct chain of causation  
16 between the statements that Philip Morris and  
17 its surrogates made and that which became part  
18 of the common knowledge of which Michelle  
19 Schwarz, by definition, shared, and that is  
20 that the tobacco companies denied, and we have  
21 heard that they denied it, over and over and  
22 over again, that cigarettes cause lung cancer.

23 First they denied it. Then they said it  
24 hasn't been proved. That it's a controversy.

25 This became part of the common knowledge

1 that the tobacco companies, in particular, as  
2 we have noticed, they formed a group, hired an  
3 agent, and hired that agent to spread that  
4 propaganda.

5 Now, there is no evidence, and it's time  
6 to face that squarely, there is no evidence  
7 that Michelle Schwarz actually saw the Frank  
8 Statement. Certainly not in its original form.  
9 She was eight-years-old at the time. Or the  
10 other statements there.

11 But we would maintain that there was a  
12 consistent pattern of misrepresentations that  
13 became, that contributed to the common  
14 knowledge, and that common knowledge, as I  
15 said, by definition, was shared by Michelle  
16 Schwarz.

17 What I would like to do is focus on the  
18 two really central aspects of this case:  
19 Addiction and light cigarettes.

20 And those are comprised in paragraphs H  
21 and I, on Page 6 of the Second Amended  
22 Complaint.

23 The fact is that, like causation of lung  
24 cancer, Philip Morris and its surrogates,  
25 denied over and over and over again that

1 cigarettes were addictive.

2 Whether they were quibbling about words,  
3 whether they were trying to protect themselves  
4 in terms of litigation that we have seen, they  
5 were not willing to acknowledge what they have  
6 acknowledged within the last year and a half,  
7 that cigarettes, smoking, nicotine is  
8 addictive.

9 And Michelle Schwarz relied on this. And  
10 she relied on the statement.

11 It is quite ironic that Mr. Phillips,  
12 after bragging about his clients have come here  
13 3,000 miles away to sit here, is now dumping on  
14 the CEO of his company, of his client, the  
15 chief executive officer who we saw on  
16 television say to the world: Tobacco is not  
17 addictive; cigarette smoking is not addictive;  
18 nicotine is not addictive.

19 And then they went ahead and published a  
20 newspaper article for everyone to see, the very  
21 next day.

22 If it weren't enough that they swore under  
23 oath then the very next day they wanted  
24 everyone to know that.

25 And it was their intent that everyone

1 should know that, that everyone should rely on  
2 it.

3 And, in fact, another CEO of the company,  
4 a former CEO at that time, or a subsequent CEO,  
5 Geoffrey Bible said yesterday, through former  
6 testimony, that he believed that it was much  
7 more credible when information came directly  
8 from the manufacturer than when it came from  
9 the public health.

10 Just the opposite of what Mr. Phillips  
11 alleges here.

12 And, of course, it is true because when a  
13 statement is made against interest, if Philip  
14 Morris had said I believe that cigarettes are  
15 addictive, as they do now, if they had said  
16 that then, this would have been believed by the  
17 American public and by Michelle Schwarz.

18 So, the fact is that Michelle Schwarz  
19 relied on what Philip Morris, through their  
20 surrogates and through their CEO, under oath,  
21 said that cigarettes were not addictive.

22 She believed that. And she relied on  
23 that, much to her detriment. She's not here  
24 today because of that.

25 The second element that requires an



1 extensive exploration is the light cigarette  
2 element.

3 And it is very interesting that  
4 Mr. Phillips, when he read the allegation to  
5 Your Honor and relied on that, didn't read all  
6 of it.

7 Oh, she thought it was less healthy or  
8 safer.

9 But the fact is the allegation says that  
10 light cigarettes delivered less tar and  
11 nicotine.

12 And, in fact, they didn't. Sure, they  
13 delivered it to a machine. Everyone knows  
14 that.

15 Philip Morris, as they were required to  
16 do, as they were required to do by the FTC, put  
17 those numbers on every single advertisement.

18 And we know that Michelle Schwarz read  
19 those advertisements or at least read the  
20 magazines that contained those advertisements.

21 They put those numbers on it, and they  
22 called it low tar. They didn't have to call it  
23 low tar.

24 Sure, there was a case that was ballyhooed  
25 about that said that they were allowed to call

1 it low tar. But they didn't have to call it  
2 low tar. And they didn't have to stop right  
3 there.

4 They could have told the smoker, the  
5 public, their customer, the people that were  
6 supporting their company with their purchases,  
7 they could have been truthful, instead of  
8 giving them the half truth that Philip Morris  
9 knew, because they knew what compensation  
10 meant, and the dangers of compensation to the  
11 smokers. That was the half truth.

12 A half truth, under Oregon law, is  
13 something that may on its own be truthful but  
14 is not the whole story.

15 It is just like witnesses are sworn to  
16 tell the whole truth, not just the truth, but  
17 the whole truth.

18 Philip Morris told a half truth. And that  
19 half truth was, if you smoke, if you buy these  
20 cigarettes, and if you smoke them, you will be  
21 delivered to you, the smoker, less tar and  
22 nicotine. And they knew that that was not  
23 true.

24 And, in fact, the use of numbers was  
25 particularly incisive because we know that

1 people react to those numbers. They see, gee,  
2 this is half the numbers that I got before.  
3 I'm going to get half as much tar and nicotine  
4 as the former cigarette that I smoked.

5 And that is exactly what Michelle Schwarz  
6 thought.

7 And we know that that was a lie or at  
8 least the statement on the advertisement was a  
9 half truth.

10 Now, in terms of the next part that says,  
11 therefore, safer and healthier, that was an  
12 implication.

13 And we heard Dr. Pollay and we heard Dr.  
14 Benowitz on Monday talk about certain  
15 advertisements giving the implication, certain  
16 Merit advertisements, giving the implication  
17 that, by delivering lower tar and nicotine this  
18 was something new and something that would help  
19 protect the smoker, that would convince the  
20 smoker that they didn't have to quit.

21 And that's the last part of this  
22 statement.

23 As an alternative to quitting smoking.

24 We saw all of the documents that Philip  
25 Morris had about their concern about the health

1 market, people who were concerned about their  
2 health, people that were on their way to the  
3 door to quit.

4 And we saw that Michelle Schwarz was  
5 exactly that type of person, that she was on  
6 her way to quit.

7 And they needed to come up with something  
8 that would intercept her before she got to the  
9 door.

10 And that interception was the  
11 advertisements for low-tar cigarette that  
12 contained the half-truth. And the half-truth  
13 that, the clear inference, is that you can  
14 switch to these brands instead of quitting.

15 And Dr. Schwarz testified that that was  
16 the bargain that he made with his wife, that  
17 when he first saw the Merit brand cigarettes in  
18 her grocery, that she, she was a bargainer,  
19 that she was saying to him, okay, I can't quit,  
20 I'm not going to quit, but this is much better  
21 than smoking the other cigarettes.

22 And now we know that it was no better or  
23 at least there's evidence that, in fact, it was  
24 no better.

25 Now, on the negligence, Mr. Phillips made

1 some big deal about safer alternatives.

2 Well Your Honor heard the same evidence  
3 that we did.

4 But what Mr. Phillips wants, what Philip  
5 Morris wants, I shouldn't say Mr. Phillips,  
6 because he's just here saying the same thing  
7 that Philip Morris has said for 50 years, what  
8 Philip Morris wants is it wants its cake and it  
9 wants to eat it, too.

10 They say we tried to make these safe  
11 cigarettes, but no one would buy it.

12 Well, if they tried to make it, and they  
13 offered it to the public, and it turned out  
14 then that the public didn't buy it, if it was  
15 available as a choice, then we might not be  
16 here.

17 If they promoted these so-called safe  
18 cigarettes the way they promote Marlboro  
19 cigarettes, they had the know-how, they had the  
20 technology, they had the ability to make these  
21 safe cigarettes, Dr. Farone and Dr. Benowitz  
22 each suggested a variant on making a safe  
23 cigarette. The important thing is that a safe  
24 cigarette alternative is not the nexus of a  
25 negligence claim. The negligence claim is the

1 unreasonable conduct of the manufacturer.

2 And the fact is that this manufacturer,  
3 for 50 years, acted unreasonably. And they  
4 acted unreasonably in a way that produced and  
5 marketed the kind of cigarettes that they  
6 marketed.

7 And don't forget that we are talking about  
8 a cigarette here. And a cigarette is composed  
9 of a variety -- we have seen the complexity and  
10 the manufacturing process that goes into a  
11 cigarette.

12 The fact is that they marketed a cigarette  
13 that a reasonable manufacturer would not have  
14 marketed, because it killed and injured a large  
15 proportion of its customers, when it was used  
16 in the exact way that it was intended.

17 The product liability claim, Comment I.  
18 This is the biggest red herring that has ever  
19 been because it talks about good tobacco.

20 Well, good tobacco may be what's growing  
21 out in the field. It may be what's being cured  
22 in the barns. It may be what's being rolled up  
23 when we think about the people in the rural  
24 areas rolling their own cigarette.

25 But good tobacco is not what Philip Morris

1 makes. They don't make tobacco. They don't  
2 make tobacco at all, as we have heard.

3 The farmers make tobacco.

4 What they do is take this tobacco and add  
5 chemicals and add additives and add filters and  
6 add paper. They make a very highly-engineered  
7 product that is so far from good tobacco that  
8 it isn't even worth using the same breath for  
9 it.

10 They make a product called a cigarette.  
11 And Comment I has nothing to do with  
12 cigarettes.

13 But even if we take Comment I at its face,  
14 this tobacco is adulterated. They acknowledge,  
15 they admit, and they admitted to Your Honor, in  
16 fact, the witness that we are going to be  
17 hearing next who's sitting out in the hall  
18 admitted to Your Honor pretrial that they do  
19 add ammonia to their cigarettes.

20 Of course, he said we add it for taste.

21 Well, they add ammonia to their  
22 cigarettes. The witness said that that -- our  
23 witnesses said that that addition of ammonia  
24 and other products which create ammonia in the  
25 pyrolysis process make that cigarette an

1 adulterated cigarette compared to good tobacco.  
2 Not compared from one cigarette to another.  
3 But compared to good tobacco. And that's the  
4 comparison.

5 Mr. Phillips said, well, they didn't  
6 compare it to anything. They didn't say that  
7 it was compared to this cigarette or that  
8 cigarette.

9 What the comparison is: Is good tobacco,  
10 so-called good tobacco, which is referenced in  
11 Comment I, and the kind of tobacco, the kind of  
12 tobacco product, the kind of cigarette that was  
13 produced by Philip Morris?

14 Clearly, it was an adulterated product,  
15 with all of the additives that they put in  
16 there.

17 Dr. Benowitz said, very, very clearly,  
18 that the ammonia that's added increases the pH.  
19 It increases the free-base nicotine as it  
20 passes into the mouth and the throat, that that  
21 free-base nicotine creates what he called and  
22 what Philip Morris calls impact, and that  
23 impact contributes to the addictive quality of  
24 the cigarette.

25 And, therefore, there's no question that,



1 through that chain of causation, and Dr. Farone  
2 said, point blank, Philip Morris added --  
3 excuse me, added ammonia to Merit cigarettes,  
4 when we brought it right down to the specific.

5 So, the fact is the causation chain is  
6 there under the product liability. This is not  
7 good tobacco. This is adulterated tobacco.

8 It was adulterated in a way that would  
9 increase the addictive quality. It kept  
10 Michelle Schwarz addicted, when they actually  
11 promised that it was something that was less  
12 tar and less nicotine. Because of  
13 compensation, she got the same tar and the same  
14 nicotine or at least proportionately a larger  
15 amount than they promised.

16 So, the fact is that this had a causal  
17 relationship to Michelle Schwarz' death. There  
18 was ample evidence of that.

19 Each of these claims is supported by  
20 evidence.

21 I will say that we are withdrawing the  
22 lost income portion of the claim. We did not  
23 elicit evidence of that, and that we are happy  
24 to have withdrawn there.

25 But the Motion for Summary Judgment or

1 Motion for Directed Verdict, I'm talking Mr.  
2 Phillips' language here, the Motion for  
3 Directed Verdict, both as it applies to any  
4 particular allegation and as it applies to the  
5 whole, each of the claims and the whole  
6 complaint, should be denied.

7 Now, I reserve the right to consult with  
8 my lawyer here on the legal arguments which I  
9 have not been able to see, but I think Mr.  
10 Phillips acknowledged they were somewhat of a  
11 rehash of what was argued in the Motions for  
12 Summary Judgment.

13 So, I would, and, hopefully I can invite  
14 him to come up and make a comment or two.

15 THE COURT: All right.

16 MR. LANE: The only comment I would make  
17 is I had an opportunity to quickly run through  
18 this, and I did see it as a revisiting of  
19 summary judgements and pretrial motions. I  
20 think the Court is very familiar with the law  
21 on negligence, strict liability, preemption,  
22 Cippolone, assumed duties.

23 And I think the Court can consider this as  
24 a factual motion, more than a substantive legal  
25 motion.

1 MR. PHILLIPS: Briefly, Your Honor?

2 THE COURT: You may, counsel.

3 MR. PHILLIPS: That is why I didn't want  
4 to argue the other ones. I'm making a record  
5 with respect to the legal issues.

6 I think for purposes, and if I said  
7 summary judgment, I apologize. It is directed  
8 verdict, obviously.

9 But, ultimately, you are doing the same  
10 thing. You are looking at the -- you have had  
11 their entire case come in. And you have to  
12 look at those facts as to whether they are real  
13 or are they are imagined or are they argument  
14 or are they real facts?

15 Now, I want to go through quickly but I  
16 want to go through each of the counts again and  
17 react to what Mr. Tauman had to say.

18 He, basically, said for paragraphs 15, A  
19 through G, we admit she didn't hear it, she  
20 didn't see it, but we would like you to  
21 conclude that she relied upon it because it is  
22 common knowledge that tobacco companies deny  
23 causation.

24 That's not reliance on fraud. That's not  
25 reliance for clear and convincing evidence for

1 purposes of fraud.

2 That's fraud in the air.

3 They made a big deal about saying: We  
4 know we need to prove reliance in this case,  
5 Your Honor. We know that the classical  
6 features of fraud require actual reliance by  
7 Michelle Schwarz.

8 That came in on summary judgment. And  
9 they gave you a little tease. They said, well,  
10 she saw this. We know she saw the 1994  
11 testimony. They didn't say anything else.  
12 They didn't say anything about whether she  
13 relied upon it or could care less about it.

14 But they figured that would get them  
15 beyond summary judgment.

16 Well, we have let the whole carpet roll  
17 out. They have had their great shot. They  
18 have been here for four weeks putting on  
19 evidence.

20 What do we know about reliance in fraud,  
21 under a clear and convincing evidence standard?  
22 We have got zero on A through G. Nothing.  
23 Absolutely nothing.

24 And what we do have, concrete evidence, is  
25 that her mother told her that smoking could

1 kill her and cause lung cancer before she  
2 started. Her mother told her it was addictive.  
3 And all of her family members say that she knew  
4 it could cause lung cancer and was addictive.

5 So, we don't have to talk about common  
6 knowledge. Let's talk about her actual  
7 knowledge.

8 So, you have no evidence of reliance, and  
9 you have what she actually now. That's  
10 directed verdict material.

11 Let's go to the next two elements. 1994  
12 hearing. Well, I listened to Mr. Tauman. He  
13 said they lied before Congress, and she relied  
14 upon it.

15 Well, where is that testimony, Your Honor?

16 Where is it?

17 We didn't hear anything like that.

18 The only thing we heard, and we heard it  
19 from their witnesses, was that she either would  
20 never have relied upon it or she obviously  
21 didn't rely upon it.

22 There is no evidence at all. And that is  
23 the only statement regarding addiction.

24 They'll say that Philip Morris has been  
25 denying addiction for the last 40 years, but

1 they don't have any representation other than  
2 this one in the complaint as to what they are  
3 claiming she relied upon. This is it. This is  
4 the complaint. You have heard the evidence.  
5 That is directed verdict. There is absolutely  
6 no evidence that Michelle Schwarz relied on  
7 those Congressional hearings or any other  
8 unidentified statement about addiction by  
9 Philip Morris or Tobacco Institute or anyone  
10 else, none of which has been presented to the  
11 jury here. That is the record we have got.  
12 That is directed verdict on fraud. No  
13 reliance.

14 We have got to clean this complaint up,  
15 Your Honor, because these are allegations that  
16 have not been proven as a result of plaintiff's  
17 case.

18 Let's go to light cigarettes. I have  
19 acknowledged that that's a more complicated one  
20 from the beginning because we do have evidence  
21 that she believed that they were less  
22 hazardous.

23 The real question, and he didn't respond  
24 to it, is why did she believe it?

25 And, Your Honor, it is an act of pure

1 speculation for him or me to tell you why.

2 What we do know is that there was a lot of  
3 evidence out there from people.

4 And I think it is common sense, I'm sorry,  
5 when the public health authorities and the  
6 government and the American Cancer Society are  
7 saying that low-tar cigarettes are less  
8 hazardous, I, at least, am listening to that a  
9 little more carefully.

10 And Mr. Bottomly had his own point of  
11 view, but that certainly is the way I would  
12 look at the evidence as a citizen.

13 And, I submit to you, you don't have to  
14 agree with me, you don't have to agree with  
15 Mr. Tauman, the question is: Is there any  
16 actual evidence that she relied upon what  
17 Philip Morris said?

18 And, as you know, the evidence is really  
19 inferential from advertisements when, in fact,  
20 the explicit point, the explicit  
21 misrepresentation was actually being  
22 articulated by the public health authorities.

23 They said low tar do produce less disease.  
24 They didn't embroider the point.

25 Now, in addition, he indicates that part

1 of the allegation, it does say, and I didn't  
2 read all of it, but part of the allegation is  
3 that they said it delivered less tar and  
4 nicotine.

5 That's a factual statement.

6 And the only statement Philip Morris can  
7 make under the current regulations is that it  
8 does deliver less tar and nicotine under the  
9 FTC method.

10 They can't say here is how it delivers tar  
11 and nicotine under the FTC method, but  
12 consumers ignore that, because we don't want  
13 you to pay attention to what the government  
14 requires us to do.

15 That's their argument. That's not fraud  
16 here. That's obeying the law.

17 I think there is conflicting evidence on  
18 whether or not smokers do or do not completely  
19 compensate. There is conflicting evidence  
20 about what Philip Morris knew or did not know.

21 I do not rest my motion on that because I  
22 think that is a genuine dispute that the jury  
23 would have to resolve.

24 On the question of fraud though, there's  
25 no real nexus between what Michelle thought and



1 what she did and what Philip Morris did with  
2 its advertisements versus what else was in the  
3 environment in terms of what she knew and cared  
4 about.

5 She was married to a physician. My guess  
6 is that she would be much more concerned about  
7 what other physicians were telling her to do  
8 than what Philip Morris was saying in its  
9 advertisements.

10 And, ultimately, again, absolutely no  
11 evidence in this case, Your Honor, that she  
12 would have quit but for going to Merit  
13 cigarettes. Not a shred of evidence. That's  
14 argument of counsel. Absolute argument of  
15 counsel.

16 What Dr. Schwarz says, he was pleased  
17 because he thought that she would use Merit  
18 cigarettes as a means of quitting. He thought  
19 it would be a means of weaning her off the  
20 cigarettes, much as Dr. Benowitz suggested.  
21 But there was no testimony about quitting  
22 beforehand or quitting and failing and then  
23 trying to go to Merits as an alternative. None  
24 of that.

25 And the advertisements he showed you

1 about, as an alternative to quitting, were not  
2 Philip Morris' advertisements. They were True  
3 and Advantage and others. That is why they put  
4 them in front of the jury, to created the  
5 inference that some other advertiser, who did  
6 make that link, Philip Morris can be blamed for  
7 that.

8 Philip Morris', every single one of their  
9 advertisements was, if you are thinking about  
10 going to low tar but you don't like the taste  
11 of them and you want to go from high tar to low  
12 tar, this is what you can do, and here it is.  
13 Here's the information.

14 And we'll stand by those advertisements  
15 because they were accurate.

16 But it seems to me the question here on  
17 this one is more of causation, not the --

18 And was her belief, we think we know that  
19 she had that belief. But was it something  
20 caused by Philip Morris or the other  
21 information by what I believe are more credible  
22 sources? And did it change her behavior in any  
23 way? Would she would have quit? No evidence  
24 of that at all.

25 All right. I want to briefly deal with

1 negligence, if I can.

2 Your Honor, I focussed on the safer  
3 cigarettes because they say that we failed to  
4 manufacturer and sell cigarettes without the  
5 characteristics described.

6 And the only evidence that we had on that  
7 were these descriptions from Dr. Benowitz and  
8 Dr. Farone about what is possible.

9 And what is possible from their  
10 perspective, according to Dr. Benowitz, is a  
11 cigarette in a different regulatory  
12 environment, not one in the current  
13 environment.

14 Again, she didn't pick the actual  
15 lower-tar cigarettes.

16 Dr. Benowitz disagrees completely with Mr.  
17 Tauman's argument, that if you had marketed  
18 like Marlboro, well, then it would have been  
19 successful.

20 Throw \$50 million dollars into an ad  
21 campaign and see if you can get people to smoke  
22 a cigarette people are not going to like.

23 Well, that's a good way of losing money.

24 But what Dr. Benowitz said is, in the  
25 current environment, none of those products can

1 succeed because other products are available  
2 which smokers will choose instead.

3 With respect to the issue of ammonia, Your  
4 Honor, Dr. Benowitz is really the only show in  
5 town. And Dr. Benowitz -- do you need a  
6 moment, Your Honor?

7 THE COURT: No.

8 Go ahead, counsel.

9 MR. PHILLIPS: Dr. Benowitz said,  
10 basically, that he has never tested a Merit  
11 cigarette. He's never measured what the actual  
12 ammonia is in the -- or the effect of ammonia  
13 on the pH of cigarettes. He agreed that the pH  
14 of Merit cigarettes is in the norm commercial  
15 range between 6 and 6.5.

16 No evidence of what the actual free  
17 nicotine was in the smoke. No evidence of its  
18 impact on Michelle Schwarz in the mouth, which  
19 is apparently where they are limiting  
20 themselves right now.

21 No actual transfer to the brain is  
22 actually being alleged.

23 So, we are really talking about maybe it  
24 made, and we have agreed from the beginning,  
25 ammonia does make the cigarette taste better,

1 but we are in the business of making a consumer  
2 product.

3 And I think that Mr. Tauman's argument  
4 absolutely confirms what I said a number of  
5 months ago, that this theory of manipulation  
6 boils down to you made your product more  
7 tasteful and more acceptable to consumers, but  
8 the whole nicotine manipulation theory ends up  
9 being reduced to that simple ridiculous point  
10 for purposes of negligence.

11 No information regarding sugars having  
12 impact. There was some theoretical testimony  
13 from Dr. Farone.

14 Adding sugars to its cigarette tobacco so  
15 as to increase the effect of nicotine.

16 Where is the proof on that one so far,  
17 Your Honor?

18 So, we have got ammonia, pH, and sugars.  
19 Those are the three negligence manipulations,  
20 and actually no application of them for  
21 purposes of Merit cigarettes. No application  
22 showing that it would have made this product  
23 more or less addictive than a product without  
24 those features.

25 And that sort of brings me to the product

1 liability point, which is he says good tobacco  
2 is what 402A and Comment I is all about. He  
3 doesn't really know what good tobacco is all  
4 about. I guess it is the word good that really  
5 matters.

6 The point is the only evidence that came  
7 in here is that the modern cigarette has far  
8 less tar and nicotine than good tobacco. It  
9 also has additives and a number of other things  
10 as part of the manufacturing process.

11 But absolutely no evidence that the  
12 product causes disease more than good tobacco  
13 or is more addictive than good tobacco.

14 In fact, all of the evidence that the  
15 Court and the jury has heard thus far is that  
16 the modern cigarette in fact does reduce  
17 disease over good tobacco, is less addictive,  
18 does not have as many carcinogens as before.

19 Even their scientists agree with that.

20 So, this sort of notion that Comment I to  
21 402 A really relates to something else that  
22 really is virginal and nice and wouldn't have  
23 had these problems is just bogus.

24 The modern cigarette is less hazardous,  
25 less addictive than the cigarettes that were

1 made by rolling them yourself.

2 And the real question is: Is there  
3 something about this product, this brand that  
4 she smoked, which makes them more dangerous  
5 than both other cigarettes and good tobacco?

6 And the answer is: There's no evidence on  
7 that, Your Honor.

8 Thank you.

9 THE COURT: All right.

10 Thank you very much.

11 MR. TAUMAN: Your Honor, I just wanted to  
12 cover two things, just very, very briefly.

13 One is a comment on the evidence itself,  
14 and the other is a comment on alternatives to  
15 selling the types of cigarettes that Philip  
16 Morris sold.

17 And that is that Dr. Benowitz specifically  
18 testified, even though it violated Philip  
19 Morris' own request for a limitation of its  
20 testimony, they sat there on cross-examination  
21 and allowed Dr. Benowitz to testify that the  
22 impact did in fact have an affect directly on  
23 the brain. That it wasn't just the tickling in  
24 the back of the throat. It was brain stuff.

25 Secondly, Mr. Phillips just commented on,

1 well, what are we going to do for us? We can't  
2 market a safe cigarette? There is no such  
3 thing as a safe cigarette.

4 Well, the question really is: What would  
5 a reasonable manufacturer do in the marketing  
6 of a product that they admit now kills hundreds  
7 of thousands of people every year and addicts  
8 even more than that?

9 What would a reasonable manufacturer do?

10 Would they fool around with the tar and  
11 the nicotine that we are going to hear Burnley  
12 and Carchman and Whidby come in and say for  
13 years and years and years? What would they do?

14 Well, no one told them that they had to  
15 sell cigarettes.

16 Mr. Dumas spent a long of time eliciting  
17 from Mr. Johnson today about all of the  
18 diversifications that they were going to do.

19 No one requires them to sell cigarettes.  
20 No one requires them, as a reasonable  
21 manufacture, to market, to manufacturer and  
22 market deadly and addictive products. That's  
23 what they should have done. What they promised  
24 to do in 1952, that if they discovered that  
25 there was something harmful in their products,



1 they would stop selling cigarettes today.

2 And today is the day.

3 THE COURT: All right. Thank you.

4 The Court would like to thank counsel for  
5 their arguments at this point in the trial for  
6 a directed verdict.

7 And both parties made persuasive arguments  
8 to the jury. And as the Court listened to  
9 these persuasive arguments, it said to me these  
10 arguments are so persuasive the Court is going  
11 to let you guys make them to the jury.

12 Motion for Directed Verdict is hereby  
13 denied on all counts.

14 MR. TAUMAN: Thank you, Your Honor.

15 MR. PHILLIPS: Thank you, Your Honor.

16 When you say all counts, you, at least,  
17 are allowing the withdrawal?

18 THE COURT: Yes. The lost wages, yes.

19 But the good persuasive arguments, I would  
20 like the jury to listen to those and make the  
21 factual determinations.

22 MR. PHILLIPS: Thank you, Your Honor.

23 THE COURT: Do the parties need a few  
24 moments to refresh themselves?

25 MR. DUMAS: I would love a few minutes,

1 Your Honor.

2 THE COURT: All right.

3 Court reporters, let's change.

4 And we'll get started in a few moments.

5 MR. DUMAS: Thank you.

6 \* \* \*

7 (Whereupon, Vol. 18-B concluded at 3:00; and,  
8 Vol. 34-C was reported by Estelle Keating.)

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1 STATE OF OREGON                    )  
  ) SS.  
2 County of Multnomah            )

3  
4           I, Jennifer Wiles, hereby certify that I  
5 am an Official Court Reporter to the Circuit  
6 Court of the State of Oregon for Multnomah  
7 County; that I reported in Stenotype the  
8 foregoing proceedings and subsequently  
9 transcribed my said shorthand notes into the  
10 typewritten transcript, pages 1 through 115,  
11 both inclusive; that the said transcript  
12 constitutes a full, true and accurate record of  
13 the proceedings, as requested, to the best of  
14 my knowledge, ability and belief.

15           Dated this 22nd day of August, 2002 at  
16 Portland, Oregon.

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20                                       \_\_\_\_\_  
                                      Jennifer Wiles  
                                      Official Court Reporter

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